92-1546

No.

FILED
MAR 23 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the federal gift tax applies to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 981 F.2d 991. The panel opinion of the court of appeals (App., *infra*, 29a-49a) is reported at 936 F.2d 343. The memorandum opinion of the district court (App., *infra*, 50a-59a) is unofficially reported at 89-2 U.S.T.C. (CCH) ¶ 13,818.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), are set forth in the Appendix, *infra*, 60a. The relevant portions of Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), are set forth in the Appendix, *infra*, 60a-63a.

STATEMENT

This case concerns the gift tax liability of Sally Ordway Irvine that stems from her disclaimer, in 1979, of a portion of her remainder interest in the Lucius P. Ordway Trust.

1. In 1917, Mrs. Irvine's grandfather, Lucius P. Ordway, established an irrevocable, inter vivos family trust. The income of the trust was to be paid to Mr. Ordway's wife and their five children during their lives.[1] Upon the death of the last to survive of Mrs. Ordway and the Ordway children, the trust was to terminate. The corpus of the trust was then to be distributed to Mr. Ordway's grandchildren in equal shares. If any of the Ordway grandchildren died with issue prior to termination of the trust, that grandchild's share of the trust principal was to

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[1] The trust also provided that, if any Ordway child died before the trust was terminated, that child's issue and the child's surviving spouse (if not remarried) were to receive the child's share of the trust income (App., *infra*, 2a-3a).

be distributed to his or her surviving issue, per stirpes (App., *infra*, 3a).

Mrs. Irvine became aware of her remainder interest in the trust when she reached the age of majority in 1931 (App., *infra*, 3a). After her father died in 1966, she became entitled to receive a share of the trust income each year (see note 1, *supra*; Tr. Doc. II-38, Exh. B, at 5). Between 1931 and 1979, she took no steps to disclaim either her income or remainder interest in the trust.

On June 27, 1979, the last of Lucius Ordway's children died and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at that time. A thirteenth grandchild had died with issue. The trust's corpus was therefore divided into thirteen shares. On August 21, 1979, Mrs. Irvine filed a disclaimer of a portion (five-sixteenths) of her interest in the trust corpus. That partial disclaimer was valid under Minnesota law. See Minn. Stat. Ann. § 501.211 (West 1988). As a result of her disclaimer, each of Mrs. Irvine's five children received one-sixteenth of her share of the distributed trust principal (App., *infra*, 3a, 52a).

Mrs. Irvine filed a federal gift tax return for the third quarter of 1979. That return disclosed that she had disclaimed a portion of her interest in the Ordway Trust, but took the position that the disclaimer did not effect a transfer of property to which the gift tax applied. Upon audit, the Commissioner of Internal Revenue determined (i) that the disclaimer constituted an indirect "transfer of property by gift" within the meaning of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), and (ii) that the disclaimer was not excepted from tax under Section 25.2511-1(c)

of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), because the disclaimer had not been made "within a reasonable time" (*ibid.*) after Mrs. Irvine became aware of her interest in the trust. Mrs. Irvine then filed an amended gift tax return and reported the disclaimer as a taxable gift. Along with her amended return, she paid the federal gift tax shown due of $7,486,671. She thereafter paid an additional $2,086,627 in accrued interest on the deficiency (App., *infra*, 4a, 31a).

Meanwhile, in August 1980, Mrs. Irvine made another gift that was unrelated to her 1979 disclaimer. She filed a gift tax return for the third quarter of 1980, on which she claimed that the tax due on that gift was offset by the unified credit available to her under 26 U.S.C. 2505. The Commissioner notified Mrs. Irvine, however, that the adjustments required for her amended 1979 third-quarter gift tax return—which reported her partial disclaimer as a gift—reduced the amount of unified credit available to her. As a result, she owed an additional $44,035 in gift taxes for the gift made in 1980. Mrs. Irvine paid the additional tax owed for 1980, plus $10,959 in accrued interest (App., *infra*, 31a-32a).

Mrs. Irvine thereafter filed a timely claim for refund of the gift tax and interest paid for the third quarter of 1979 and the third quarter of 1980. The claim for refund was denied by the Internal Revenue Service (App., *infra*, 4a, 32a).

2. After Mrs. Irvine's death in 1987, respondents—who are the personal representatives of her estate—filed this action seeking a refund of the gift tax and interest paid. On cross-motions for summary judgment, the district court held that the tax was

improperly assessed and ordered a refund of tax and interest in the amount of $22,748,250 (App., *infra*, 4a, 32a-33a).

The district court acknowledged that, in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), this Court held that "a disclaimer [is] a 'transfer' within the scope of the gift tax provisions" (*id.* at 318). The district court concluded, however, that "[t]he fundamental distinction between *Jewett* and the present case is that the original transfer by Lucius Ordway occurred in 1917, well before the Gift Tax Act was passed in 1932" (App., *infra*, 56a). The district court noted that, "[a]s originally enacted, the 1932 Gift Tax Act clearly states that '[t]he tax shall not apply to a transfer made on or before the date of enactment of this Act'" (App., *infra*, 56a-57a (quoting Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245)). The court therefore concluded that the gift tax could not apply to the disclaimer in this case (App., *infra*, 57a).

In reaching its conclusion, the court noted that another district court had "reached the same conclusion on virtually identical facts" in a case involving the same trust and one of Mrs. Irvine's brothers who also had partially disclaimed his interest in the Ordway Trust (App., *infra*, 58a, citing *Ordway* v. *United States*, 89-1 U.S.T.C. (CCH) ¶ 13,802 (S.D. Fla. Mar. 13, 1989)). The court stated that it found the reasoning of the "indistinguishable" *Ordway* decision to be "compelling" (App., *infra*, 58a).

3. A divided panel of the court of appeals reversed (App., *infra*, 29a-49a). Judge McMillian, writing for the court, noted that the Eleventh Circuit, in *Ordway* v. *United States*, 908 F.2d 890 (1990), cert. denied, 111 S. Ct. 2916 (1991), had reversed the decision on which the district court had relied. Judge

McMillian stated that "[w]e agree with the Eleventh Circuit that the fact that the creation of the Ordway trust in 1917 pre-dated the enactment of the federal gift tax in 1932 is not dispositive" (App., *infra*, 35a). He concluded that the gift tax properly applies to this case because here, "as in *Ordway*, the government does not seek to tax the transfers that created the Ordway trust in 1917; it seeks to tax Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in the trust, an indirect transfer which occurred well after * * * enactment of the gift tax in 1932" (*id.* at 36a).

Judge McMillian noted that "[t]he scope of [the gift] tax is broad, applying 'whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible" (*id.* at 34a, quoting *McDonald* v. *Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988)). He concluded that here, as in *Jewett*, the disclaimer constitutes "an indirect gift to a successor in interest subject to federal gift tax liability" (App., *infra*, 35a, quoting 455 U.S. at 306).

Judge McMillian further concluded that Mrs. Irvine had failed to come within the regulatory safe harbor for disclaimers that occur "within a reasonable time" after the taxpayer acquires knowledge of the interest being disclaimed (App., *infra*, 39a-40a). This safe-harbor provision, Section 25.2511-1(c)(2) of the gift tax regulations, states (26 C.F.R. 25.2511-1(c)(2) (emphasis supplied)):

> In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, * * * a refusal to accept ownership does *not* constitute the making of a gift

> if the refusal is made within a reasonable time after knowledge of the existence of the transfer.

Judge McMillian noted that the regulatory safe harbor was *potentially* applicable to this case, even though the original trust was established before enactment of the gift tax. Although the regulation applies only to disclaimers from "taxable transfers," that term is defined in the regulations to include any "completed gift for Federal gift tax purposes regardless of whether a gift tax [was] imposed on the completed gift" (App., *infra*, 37a, quoting 26 C.F.R. 25.2518-2(c)(3)). The pre-1932 trust involved in this case therefore qualifies as a "taxable transfer" within the scope of the regulation, and the regulation thus potentially provides a mechanism for a timely disclaimer to escape tax (App., *infra*, 37a).

In *Jewett*, however, this Court held that the "reasonable time" for a disclaimer to be made runs from the time "when the disclaimed interest was created and not later when that interest vested" (App., *infra*, 39a, citing 455 U.S. at 312, 318-319). Since Mrs. Irvine's disclaimer occurred in 1979, which was "some 48 years" after she first became aware of her interest, the disclaimer "was clearly too late" (App., *infra*, 39a).[2]

Senior Judge Bright filed a concurring opinion in which he agreed that "Mrs. Irvine's remainder inter-

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[2] The panel noted that respondents had not contended that *Jewett*, which was decided in 1982, should not be applied "retroactively" to this case (App., *infra*, 41a). The panel therefore declined to consider that issue (*ibid.*). Judge McMillian noted, however, that the Court had found no retroactivity problem in *Jewett* because the taxpayer "never had such a right" to disclaim his interest free of the gift tax (App., *infra*, 41a n.2, quoting 455 U.S. at 317).

est was subject to the federal gift tax unless her disclaimer * * * was timely" (App., *infra*, 43a). Judge Bright stated that "the time period for Mrs. Irvine to disclaim her interest began to run, at the latest, in 1931 when she was aware of her remainder interest and had reached the age of majority" (*ibid.*). He concluded that "Mrs. Irvine's partial disclaimer, almost fifty years later, was not made within a reasonable time" (*id.* at 43a-44a).

Judge Bowman dissented. He stated that Section 25.2511-1(c)(2) of the regulations "reflects the unassailable premise that a disclaimer is not subject to the federal gift tax unless the transfer creating the interest disclaimed was a 'taxable transfer' for purposes of the Gift Tax Act" (App., *infra*, 44a). "Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917" (*id.* at 48a), Judge Bowman reasoned that "it never was subject to the federal gift tax and therefore was never a 'taxable transfer' for federal gift tax purposes" (*ibid.*).

4. On respondents' petition for rehearing with suggestion for rehearing en banc, the court of appeals vacated the panel decision and affirmed the district court by a 7-4 vote (App., *infra*, 1a-28a). The majority stated that "*Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here" (App., *infra*, 6a n.2). The majority noted that Section 25.2511-1(c)(2) of the regulations refers to "*taxable transfers* creating an interest in the person disclaiming made before January 1, 1977" (App., *infra*, 5a, quoting 26 C.F.R. 25.2511-1(c)(2)). In the ma-

jority's view, that regulation "reflects the fundamental principle that a disclaimer should not be subject to the federal gift tax unless the transfer creating the interest disclaimed was itself a 'taxable transfer' " (App., *infra*, 5a-6a). The majority reasoned that, "absent this limitation, the gift tax would be imposed on a donee's refusal to accept a gift that never was subject to the tax in the first place, an anomaly that Congress, given its clear intent * * * that the gift tax should not have any retroactive application, did not ordain" (*id.* at 6a). The majority held that the creation of the trust in 1917, 15 years before the enactment of the gift tax, did not constitute a "taxable transfer" within the meaning of the regulation and that, as a result, the regulation's timeliness requirement did not apply (*id.* at 6a-7a).

The majority then concluded that, because Section 25.2511-1(c)(2) of the regulations is inapplicable, "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (App., *infra*, 10a). Noting that Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), the majority concluded that "this disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*). The majority acknowledged (*id.* at 7a-8a) that its decision is in direct conflict with the Eleventh Circuit's decision in *Ordway* v. *United States*, *supra*, which upheld application of the gift tax to a disclaimer made by another beneficiary of the same Trust.

Judge Loken filed a concurring opinion. He wrote separately "to address whether the regulation in effect when Mrs. Irvine made her disclaimer applies to this case" (App., *infra*, 12a). Judge Loken noted that "[t]he regulation as originally promulgated in 1958

did not contain the current regulation's reference to 'taxable transfers' " (*ibid.*). In his view, "this prior version of the regulation does not apply in this case because it only applied to 'property transferred from a decedent,' whereas the interest Mrs. Irvine disclaimed was created by an inter vivos trust" (*id.* at 13a).

Judge McMillian filed a dissenting opinion in which Senior Judges Lay and Bright and Judge Gibson joined. In their view, "the majority opinion's interpretation of 'taxable transfer' as a transfer made after the enactment of the federal gift tax is too narrow" (App., *infra*, 17a). They would have followed the Eleventh Circuit's decision in *Ordway*, and held (i) that the "reasonable time" within which a taxpayer may avoid the gift tax by disclaiming an interest in property is governed by Section 25.2511-1(c) of the regulations, and (ii) that the term "taxable transfer" as used in that regulation includes " 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transfer was not subject to the gift tax" (App., *infra*, 17a-18a, quoting *Ordway* v. *United States*, 908 F.2d at 895). The dissent concluded that "whether or not the interest created was established before the enactment of the federal gift tax is irrelevant; the key is whether the interest was created by a 'taxable transfer,' that is, a completed gift" (*id.* at 20a).

REASONS FOR GRANTING THE PETITION

The decision in this case creates a direct conflict in the circuits on a recurring matter of substantial administrative importance. The court of appeals held that a taxpayer's disclaimer of a remainder interest

in a trust—a disclaimer made 62 years after the creation of the trust and 48 years after the taxpayer attained her majority—was not a transfer subject to the federal gift tax because the trust had been created prior to the enactment of the federal gift tax. As the court of appeals recognized (App., *infra*, 7a-8a), its decision directly conflicts with the decision of the Eleventh Circuit in *Ordway* v. *United States*, 908 F.2d 890 (1990), cert. denied, 111 S. Ct. 2916 (1991). It also contradicts the express holding of this Court in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), that the disclaimer of a remainder interest in a trust is a "transfer of property by gift" (26 U.S.C. 2501(a)(1)) to which the gift tax applies.

The question presented in this case affects a significant number of individuals who have remainder interests in trusts that were established before the gift tax was enacted in 1932. As the facts of this case and the *Ordway* case indicate, the tax treatment of such disclaimers potentially affects billions of dollars of assets and enormous amounts of gift tax revenues. Unless the clear conflict among the circuits is resolved by this Court, the tax treatment of such disclaimers—even for beneficiaries of the same trust, and even though millions of dollars of taxes are affected—will continue to vary solely due to geographical happenstance.

1. Sections 2501(a) and 2511(a) of the Internal Revenue Code impose a tax "on the transfer of property by gift," whether the transfer "is in trust or otherwise," and whether the gift is "direct or indirect." 26 U.S.C. 2501(a), 2511(a). By taxing gifts, Congress sought to discourage circumvention of the estate tax by means of inter vivos transfers

that deplete taxable estates. See, *e.g.*, *Jewett* v. *Commissioner*, 455 U.S. at 310; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939). Consistent with that objective, "Congress intended the gift tax statute to reach all gratuitous transfers of any valuable interest in property" (*Dickman* v. *Commissioner*, 465 U.S. 330, 334 (1984)). See H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932); S. Rep. No. 665, 72d Cong., 1st Sess. 39 (1932)). In *Jewett* v. *Commissioner*, the Court therefore held that the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust" (455 U.S. at 310). The Court noted that the practical effect of a disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (*ibid.*).

The Treasury Regulations on Gift Tax implement the broad scope of the federal tax by providing that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1 (c)(1)). For disclaimers of property, however, there is a narrow exception, or safe harbor, to this general rule of taxability. Section 25.2511-1(c)(2) of the regulations provides that a refusal to accept ownership of property does not constitute a gift if two conditions are met. First, the refusal must be effective under local law. Second, the refusal must be made "within a reasonable time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1 (c)(2)).[3] This Court held in *Jewett* that the term

[3] The "reasonable time" requirement of the regulation applies to disclaimers of interests that were created before Jan-

"transfer," as used in the regulation, refers to the original creation of the interest, rather than the subsequent vesting of that interest. 455 U.S. at 311-312. In *Jewett*, the trust was established in 1939 under the will of the taxpayer's grandmother, but the taxpayer did not disclaim his contingent remainder interest until 1972. The Court held that the disclaimer—filed 33 years after the interest was created—was untimely. *Id.* at 318-319.

In this case, Mrs. Irvine's contingent remainder interest was created upon establishment of the trust in 1917. She learned of her interest in the trust by the time she attained her majority in 1931. After her father's death in 1966, Mrs. Irvine became entitled to receive a share of the income from the Ordway trust each year, and her share increased after the death of her mother in 1974. See note 1, *supra*; Tr. Doc. II-38, Exh. B at 5. Mrs. Irvine did not, however, disclaim any portion of her remainder interest in the trust corpus until after the termination of the trust in 1979. At that time, she was 68 years old, had enjoyed her income interest in the trust for 13 years and had known of her remainder interest in the trust for 48 years. As this Court stated in *Jewett*, a disclaimer in these circumstances is subject to the gift tax because—"like the holder of a general power [of appointment]—a disclaimant may decide to retain the interest himself. It is this characteristic of the control exercised by the disclaimant that makes a disclaimer a 'transfer' within the scope of the gift tax provisions" (455 U.S. at 318).

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uary 1, 1977 (26 C.F.R. 25.2511-1(c)(2)), and therefore applies in this case. Congress has enacted specific and objective time criteria for the non-taxability of disclaimers of interests created *after* 1976. See note 5, *infra*.

2. Relying on this Court's decision in *Jewett*, the government contended in this case that (i) Mrs. Irvine's disclaimer was subject to the federal gift tax and (ii) that the disclaimer was not made "within a reasonable time" of her knowledge of her interest in the Trust and thus was not exempted from the tax under the safe-harbor provisions of Section 25.2511-1(c) of the gift tax regulations. The court of appeals held, however, that the disclaimer was not subject to the gift tax because the transfer creating the Trust was made before enactment of the first gift tax in 1932 and Congress had made clear its intent that the gift tax not be applied "retroactively" (App., *infra*, 7a-10a).

a. The court of appeals misperceived the transaction that is subject to tax in this case. It is Mrs. Irvine's 1979 disclaimer, not her grandfather's 1917 transfer in trust, to which the gift tax applies. No gift tax has been imposed upon Lucius Ordway's original transfer in trust. That 1917 transfer is relevant only in establishing the date on which the interest disclaimed was created. See note 3, *supra*. Mrs. Irvine's partial disclaimer of her remainder interest in 1979 is a separate and distinct transaction.

Mrs. Irvine's remainder interest in the Trust was a valuable property interest, even though it was subject to contingencies and did not become possessory until immediately before she partially disclaimed it in 1979. See *Jewett* v. *Commissioner*, 455 U.S. at 318-319; *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). After the death of her father in 1966, Mrs. Irvine became entitled to receive a share of the income of the trust each year. And, for 48 years, Mrs. Irvine possessed the power to decide the ultimate disposition

of her remainder share of the corpus of the trust, and she relinquished that power only after her interest became possessory. It is precisely upon the relinquishment of the power to control the disposition of property that the gift tax is laid. *E.g.*, *Estate of Sanford* v. *Commissioner*, 308 U.S. at 43; *Burnet* v. *Guggenheim*, 288 U.S. 280, 285-287 (1933). As this Court stated in *Jewett*, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer of a contingent future interest in a trust," for the effect of the disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (455 U.S. at 310).

Under *Jewett*, Mrs. Irvine's long-delayed disclaimer is "unquestionably" (405 U.S. at 310) a transfer to which the gift tax applies. The decision in this case thus conflicts not only with the Eleventh Circuit's decision in *Ordway* v. *United States*, 908 F.2d at 893-895, but also with this Court's decision in *Jewett*.[4]

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[4] The majority's reliance (App., *infra*, 9a-10a) on *Commissioner* v. *Copley's Estate*, 194 F.2d 364 (7th Cir. 1952), is misplaced. In *Copley's Estate*, a couple entered into an antenuptial agreement in 1931 under which the prospective husband agreed to pay $1 million to his future wife upon demand at any time after their marriage. In return, she surrendered any other marital property rights to which she may have been entitled. In fulfillment of this pledge, the husband transferred $500,000 in securities to his wife in 1936 and the same amount in 1944. Although such a transfer of property in return for the surrender of marital property rights had been held to be a gratuitous transfer (see *Commissioner* v. *Wemyss*, 324 U.S. 303, 306-307 (1945)), the Seventh Circuit held that the transfers involved in *Copley's Estate* were not subject to the gift tax because the relevant transaction preceded enactment of the tax. In the Seventh Circuit's view, in

b. The court of appeals further erred in concluding that Section 25.2511-1(c)(2) of the gift tax regulations does not apply in the circumstances of this case. Under this regulation, a disclaimer is *not* subject to the gift tax if it was made within a reasonable time after the "taxable transfer" that created the interest (26 C.F.R. 25.2511-1(c)(2)).[5] The majority

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1936 and 1944, the husband was simply discharging an obligation that arose under the 1931 agreement. The court concluded that, in these circumstances, subjecting the transfers to the gift tax would have amounted to a retroactive imposition of the tax. 194 F.2d at 367. By contrast, in the present case, it is the disclaimer made by Mrs. Irvine in 1979—not the distribution of the trust assets upon termination of the trust—that is being subjected to tax.

The facts of *Copley's Estate* would parallel the facts of the present case only if *Copley's Estate* involved a gratuitous transfer *by the wife after 1932* of her right to receive the property from her husband. In that hypothetical situation, as here, the gratuitous transfer of an interest in property after 1932 would plainly be subject to the gift tax.

[5] The disclaimer regulation (26 C.F.R. 25.2511-1(c)) was amended on August 7, 1986, to conform to the new regulations then being issued under Section 2518 of the Internal Revenue Code. See T.D. 8095, 1986-2 C.B. 160. Section 2518 of the Code was enacted in 1976. For disclaimers of interests created *after* 1976, Section 2518 eliminated the "reasonable time" requirement of the disclaimer regulation and established new, objective rules for determining the timeliness of disclaimers. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b), (e)(2), 90 Stat. 1893, 1896. Under the new statute, a "qualified disclaimer" must be made within nine months after the later of the date on which the transfer creating the interest is made or the day on which the person making the disclaimer attains age 21. 26 U.S.C. 2518(b)(2). Section 2518 is not directly involved in this case because it applies only to disclaimers of interests that were created after December 31, 1976 (Treas. Reg. 25.2518-1(a)), and the interest disclaimed

concluded that the creation of the trust in 1917, fifteen years before the gift tax was enacted, did not constitute a "taxable transfer" within the meaning of the regulation, and that, as a result, the regulation's timeliness requirement did not apply in this case (App., *infra*, 6a-7a). As the Eleventh Circuit correctly recognized in *Ordway* v. *United States*, 908 F.2d at 895, however, the term "taxable transfer" in the amended regulation merely refers to a transfer that is a completed gift, whether or not a gift tax was actually imposed. Section 25.2518-2(c)(3) of the regulations specifically provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." For the purposes of measuring the time in which to file a tax-free disclaimer, a "taxable transfer" occurs under the regulations "whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax" (*Ordway* v. *United States*, 908 F.2d at 895, quoting 26 C.F.R. 25.2511-1(c)(1) (citation omitted)).[6]

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by Mrs. Irvine was created in 1917. As noted by the dissent, "§ 25.2511-1(c)(2) and § 25.2518 are complementary regulations: interests created by 'taxable transfers' made after December 31, 1976, are subject to the 'new' uniform standards established by the 1976 Act and § 25.2518, while interests created by 'taxable transfers' before January 1, 1977, are subject to the 'old' standards set forth in § 25.2511-1(c)(2)" (App., *infra*, 20a).

[6] The majority urged that the Eleventh Circuit misapplied this regulation, on the theory that the regulation is concerned

Under this express regulatory definition, the 1917 transfer in trust constitutes a "taxable transfer" for purposes of the disclaimer regulation even though that transfer "was not subject to the gift tax" (*ibid.*). Whether the interest disclaimed by Mrs. Irvine was created before or after enactment of the federal gift tax, her failure to disclaim her interest "within a reasonable time" thus precludes her reliance on the safe-harbor provisions of the regulation.

c. The majority also erred in concluding that, if Section 25.2511-1(c)(2) of the regulations is inapplicable to this case, then "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (App., *infra*, 10a). Based on that erroneous conclusion, the majority held that, because Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), her "disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*).

Even if the court of appeals had been correct in concluding that the safe-harbor regulation does not apply to Mrs. Irvine's disclaimer, that does not mean that the disclaimer is non-taxable. The regulation merely creates a limited exception to the otherwise

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"with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers" (App., *infra*, 9a). As the dissent correctly pointed out, however, "[t]he reference to the $10,000 annual exclusion on gifts in § 25.2518-2(c)(3) is merely *an illustration* of how a taxable transfer may occur when there is a completed gift regardless of whether the gift tax is imposed on the completed gift" (App., *infra*, 22a). The single illustration provided by the regulation obviously does not exhaust the entire scope of its provisions.

comprehensive scope of the gift tax.[7] It provides that, if a disclaimer is made within a reasonable time, then (and only then) it "does *not* constitute the making of a gift" (26 C.F.R. 25.2511-1(c)(2) (emphasis added)). If a disclaimer does *not* come within the terms of this regulatory exception, it is taxable under the general rule of the regulation that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1(c)). See also *Dickman* v. *Commissioner*, 465 U.S. at 334 ("Congress intended the gift tax statute to reach all gratuitous transfers of any valuable interest in property").

The "validity" of the disclaimer under local law (which has not been contested by any party) is relevant only because, if the disclaimer were *not* valid under local law, there would have been no completed transfer and this case would never have arisen. See 26 U.S.C. 2501(a)(1) (imposing a tax on "the transfer of property by gift"). The fact that the disclaimer was valid under Minnesota law merely establishes that there was in fact a "transfer of property" (*ibid.*). It has no bearing on whether or not that transfer was "by gift" and is therefore subject to the gift tax. See *ibid.* The question whether a disclaimer constitutes a transfer of property "by gift" was resolved by this Court in *Jewett*, where the Court held that the transfer "by means of a disclaimer[] of a

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[7] It is well established that exemptions from taxation are to be narrowly construed. *E.g.*, *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969).

contingent future interest in a trust" is "unquestionably" within the scope of the gift tax (455 U.S. at 310).

By erroneously referring to state law, rather than federal law, for determining the ultimate question of whether a transfer "by gift" has occurred, the en banc decision of the court of appeals in this case conflicts both with the decision of the Eleventh Circuit in *Ordway* and with this Court's decision in *Jewett*.

3. The question presented in this case is one of substantial recurring importance. The amount at issue in this single case, including interest, currently exceeds $30,500,000. Other cases involving the disclaimer of remainder interests in the Ordway Trust, in which an additional several million dollars in gift tax and interest are at stake, are currently pending in two district courts. *Johnson* v. *United States*, No. 89-8192 (S.D. Fla. filed Apr. 27, 1989); *Johnson* v. *United States*, No. 3-89-265 (D. Minn. filed Apr. 28, 1989). More importantly, the decision of the court of appeals affects the gift tax liability (and, indirectly, the potential estate tax liability) of a large number of individuals who have contingent remainder interests in trusts created prior to the enactment of the gift tax.[8] Relying on the opinion of the court

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[8] The decision of the court of appeals also threatens significant uncertainty for application of the disclaimer rules to interests in property created by various other types of inter vivos and testamentary transfers that constitute completed dispositions of property and are therefore "taxable transfers" within the meaning of the regulations even though they do not give rise to estate or gift tax liability. Among these are the release or lapse of a general power of appointment (26 U.S.C. 2041(a)(1)), transfers by nonresident aliens of property situated outside the United States (26 U.S.C. 2103), and

of appeals, these individuals may now seek to disclaim such interests on a tax-free basis, even though they may have known of the existence of their interests, and controlled the disposition of those interests, for many years.

The Internal Revenue Service advises that thousands of trusts created prior to 1932, with billions of dollars of trust assets, remain in existence. It is, of course, impossible to estimate with precision the magnitude of the impact of the decision of the court of appeals. It is nonetheless evident that the decision in this case offers significant new opportunities for gift and estate tax avoidance by members of the wealthiest class of taxpayers. Left intact, the decision in this case will predictably generate a large volume of claims and litigation involving substantial amounts of revenue.

In the absence of a decision from this Court, the tax treatment of disclaimers of these valuable property interests will vary solely because of the circuit in which the taxpayer happens to reside. Taxpayers who control the disposition of billions of dollars of trust assets in circuits that have not yet spoken on the question presented in this case will be unable to pursue their important gift and estate planning decisions with certainty. Further review of this recurring issue by this Court is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

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the creation of joint interests between spouses (26 U.S.C. 2515 (1976)). Extension of the analysis adopted by the court of appeals majority in this case to property interests created by such transfers would result in a substantial erosion of the gift tax base.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89-5616

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the ESTATE OF SALLY O. IRVINE, APPELLEES

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the United States District Court for the District of Minnesota

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Submitted: January 6, 1992

Filed: December 28, 1992

Before LAY,* Chief Judge, BRIGHT, Senior Circuit Judge, McMILLIAN, ARNOLD,** JOHN R.

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* The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992.

** The Honorable Richard S. Arnold became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

GIBSON, FAGG, BOWMAN, WOLLMAN, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

BOWMAN, Circuit Judge.

The United States appeals from the order of the District Court granting summary judgment in favor of John O. Irvine and First Trust National Association (taxpayers) as the personal representatives of the Estate of Sally Ordway Irvine (Mrs. Irvine) and directing the government to refund federal gift taxes and interest paid by Mrs. Irvine for the third quarter of 1979 and the third quarter of 1980. For reversal, the government argues the District Court erred in holding that Mrs. Irvine's partial disclaimer in 1979 of a remainder interest in a trust created by her grandfather in 1917 was not subject to federal gift tax, I.R.C. §§ 2501-2524 (1988).

A three-judge panel of this Court, with one judge dissenting, ruled in favor of the government. *Irvine v. United States*, 936 F.2d 343 (8th Cir. 1991) (subsequent history omitted). The Court granted taxpayers' suggestion for rehearing en banc, thereby vacating the panel opinion. We now affirm the order of the District Court.

I.

The underlying facts are not disputed. Mrs. Irvine was a granddaughter of Lucius P. Ordway. In January 1917 Lucius P. Ordway established an irrevocable inter vivos trust. The trust income was to be paid to Ordway's wife, Jessie G. Ordway, and their five children for their lives. The trust also provided that if any of Ordway's children died before the termination of the trust, that child's issue and the

child's surviving spouse, as long as the surviving spouse remained unmarried, would receive the child's share of the trust income. On the death of the last surviving life beneficiary, the trust would terminate and the trust corpus would be distributed to the grandchildren, per capita. If any of the grandchildren died with issue before the termination of the trust, that grandchild's share would be distributed in equal portions to his or her surviving issue. Mrs. Irvine became aware of her contingent remainder interest in the trust when she turned 21 in 1931.

In June 1979 Katharine G. Ordway, who was Mrs. Irvine's aunt and the last surviving child of Lucius P. Ordway, died unmarried, and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at the time of Katharine G. Ordway's death. Because one grandchild had died with issue, the trust corpus was to be divided into thirteen shares. In August 1979, about two months after Katharine G. Ordway's death, Mrs. Irvine disclaimed part of her share of the trust corpus. It is undisputed that Mrs. Irvine's partial disclaimer was valid under Minnesota law. Minn. Stat. § 501.211 (1988) (valid disclaimer if filed in Minnesota district court within six months of event which causes disclaimant to be finally ascertained and interest indefeasibly fixed), *repealed by* 1989 Minn. Laws, ch. 340, art. 1, § 77 (replaced by Minn. Stat. § 501B.86 (1990), which changed the deadline to nine months effective January 1, 1990). As a result of the partial disclaimer, Mrs. Irvine was treated, with respect to the disclaimed interest, as if she had died before the termination of the trust, and her five children thus received, as provided by the trust instrument, the disclaimed portion of her share of the trust corps.

On audit of Mrs. Irvine's gift tax return for the third quarter of 1979, the Internal Revenue Service (IRS) took the position that the disclaimer effected a taxable gift by Mrs. Irvine to her children. Mrs. Irvine consequently paid, under protest, the gift tax asserted to be due on the disclaimer, as well as the accrued interest on the deficiency, and filed a timely claim with the IRS for a refund. Later the IRS notified Mrs. Irvine that, because the adjustments made to her gift tax return for the third quarter of 1979 on account of the disclaimer had reduced the amount of unified credit available to her, she owed additional gift taxes for the third quarter of 1980. She paid these additional taxes and accrued interest, and made another timely filing with the IRS for a refund. In March 1987 the IRS disallowed both of the refund claims, and in November of that year Mrs. Irvine died.

In February 1988, taxpayers filed the present action seeking a refund of the gift taxes and interest paid. *See* I.R.C. § 7422 (1988); 28 U.S.C. § 1346 (a)(1) (1988). On cross-motions for summary judgment, the District Court ruled in favor of taxpayers, holding they are entitled to a refund of the gift taxes and interest paid for the third quarter of 1979 and the third quarter of 1980, together with the accrued interest on those amounts. A final judgment was entered for taxpayers in the total amount of $22,748,250.43, plus interest from the date of judgment. This appeal followed.

II.

We review de novo the district court's decision to grant summary judgment. Summary judgment is proper when there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *McCuen v. Polk County*, 893 F.2d 172, 173 (8th Cir. 1990). In the present case, the relevant facts are not disputed.

III.

The question on which this appeal turns is whether Mrs. Irvine's 1979 partial disclaimer of her contingent remainder interest in an irrevocable trust created in 1917 (when there was no federal gift tax) effected a gift to her children for federal gift tax purposes. The government contends that it did, basing its position on the application of Treasury Regulation § 25.2511-1(c)(2), which provides in pertinent part:

> In the case of *taxable transfers* creating an interest in the person disclaiming made before January 1, 1977 . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance.

Treas. Reg. § 25.2511-1(c)(2) (as amended in 1986) (emphasis added).[1] This regulation reflects the fun-

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[1] The government in its oral argument has conceded that Section 25.2511-1(c)(2) as amended in 1986 supersedes any earlier version of the regulation and governs this case. The earliest version of this regulation, which has the effect of creating a federal standard governing the validity of disclaimers for gift tax purposes, was promulgated in 1958.

damental principle that a disclaimer should not be subject to the federal gift tax unless the transfer creating the interest disclaimed was itself a "taxable transfer"; absent this limitation, the gift tax would be imposed on a donee's refusal to accept a gift that never was subject to the tax in the first place, an anomaly that Congress, given its clear intent, as discussed *infra*, that the gift tax should not have any retroactive application, did not ordain. We note that, consistent with this fundamental principle, the Treasury Department has not promulgated any regulation dealing with the disclaimer of interests created by "nontaxable transfers."

The transfer that created Mrs. Irvine's contingent remainder interest occurred in 1917, when Lucius P. Ordway established his irrevocable inter vivos trust. If the establishment of this trust is indeed a "taxable transfer," even though in 1917 the federal gift tax had not yet been enacted, then Mrs. Irvine's disclaimer of her contingent remainder interest created by the trust would be subject to the federal gift tax unless her disclaimer was timely within the meaning of the regulation.[2] But if the creation of her interest by the 1917 Ordway trust is not a "taxable transfer," then the interest validly disclaimed by Mrs. Irvine under Minnesota law passes to her five children unencumbered by the federal gift tax. The govern-

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[2] The issue of timeliness in cases controlled by the regulation is the subject of *Jewett v. Commissioner*, 455 U.S. 305 (1982). *Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here. It is beyond dispute that in *Jewett* the transfer creating an interest in the person disclaiming was a taxable transfer.

ment stakes its case on the proposition that the creation of Mrs. Irvine's interest in the Ordway trust is a "taxable transfer" within the meaning of Treasury Regulation § 25.2511-1(c)(2). We find that proposition untenable.

It is fundamental that for a transfer to be taxable there must be an applicable tax in existence when the transfer is made. No such federal tax existed on January 16, 1917, when Lucius P. Ordway irrevocably transferred assets to the trustees of the Ordway trust and Mrs. Irvine's interest was created. Moreover, fifteen years later when the Gift Tax Act of 1932 was enacted, Congress expressed its intention not to apply the tax retroactively. Section 501(b) of the Act states: "The tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 169, 245 (1932). This prohibition against retroactive application of the tax to pre-Act gifts has been continued throughout revisions of the Gift Tax Act and is reflected in the current Internal Revenue Code (Code) in the section governing computation of the tax. I.R.C. § 2502 (1988) (the tax is computed upon the aggregate sum of taxable gifts made throughout the donor's life during periods following June 6, 1932). "Congress has been careful to avoid any taint of retroactivity in connection with the 1932 [gift] tax and the subsequent amendments to the tax." Charles L. B. Lowndes et al., *Federal Estate and Gift Taxes* 643 (3d ed. 1974).

We are mindful that in a case involving Mrs. Irvine's brother John G. Ordway, the Eleventh Circuit has held that "the 1917 gift [of Lucius P. Ordway] was a taxable transfer." *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990), *cert. denied*,

—— U.S. ——, 111 S. Ct. 2916 (1991). The *Ordway* decision gives a new definition to the term "taxable transfer" by referring to section 25.2518-2(c)(3) of the regulations, which provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." Treas. Reg. § 25.2518-2(c)(3). Based on that language, the *Ordway* decision concludes that "a taxable transfer occurs whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' 26 C.F.R. § 25.2511(c)(1) [sic], even if that transaction was not subject to the gift tax." *Ordway*, 908 F.2d at 895.

Relying on *Ordway* and its interpertation of Treasury Regulation § 25.2518-2(c)(3), the government urges us to join the Eleventh Circuit in holding that the term "taxable transfer" in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax. We are unable, however, to accept our sister circuit's startling conclusion. The *Ordway* court's reliance on a single sentence from a regulation explicating a section of the Code that is plainly inapplicable to this situation[3] is inappropriate and misplaced. We have dif-

[3] Neither Mrs. Irvine's nor her brother John G. Ordway's disclaimer is governed by section 2518 of the Internal Revenue Code. *See* I.R.C. § 2518 (1988). The interest each of them disclaimed was created by a transfer in the year 1917. Section 2518 and the rules implementing section 2518 apply only to the disclaimer of interests created by taxable transfers made after December 31, 1976. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. 1520, 1896 (1976); Treas. Reg. § 25.2518-1(a)(1).

ficulty in understanding how there can be, in the language of section 25.2518-2(c)(3), "a completed gift for Federal gift tax purposes" unless a federal gift tax is in force when the gift is made.

Moreover, the sentence relied upon is taken out of context to support an expanded and illogical definition of the term "taxable transfer" that would include a pre-Act transfer. The distorted nature of this reading of the regulation is evident when the sentence is read in context with the sentence that immediately follows it: "[A] taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers . . . ." Treas. Reg. 25.2518-2(c)(3). Clearly, the sentence upon which the Eleventh Circuit relied is concerned with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers. There is a definitive difference between a taxable transfer that qualifies for the annual exclusion and on which a gift tax therefore is not imposed, such as an annual $10,000 check to a favorite nephew, and a transfer as to which the gift tax is not even applicable, such as a transfer pursuant to an obligation created in an antenuptial agreement executed in 1931 between a man and woman married later that year. *See Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952) (transfers made in 1936 and 1944 pursuant to 1931 agreement were not taxable because "[t]o hold, as the Commissioner would have us do . . . would require a retroactive application of [the gift tax], which we think is not permissible. See

Sec. 501(b) of the Revenue Act of 1932."). The creation of the Ordway trust in 1917 falls into the same category as the transfers pursuant to the 1931 antenuptial agreement in *Copley's Estate*; it is a transfer as to which the federal gift tax is inapplicable—and even more cleanly and clearly so than the post-1932 transfers pursuant to the 1931 agreement in *Copley's Estate*.

In light of the consistently expressed intent of Congress not to apply the gift tax retroactively to transfers made prior to June 6, 1932, we cannot accept the proposition that the term "taxable transfer" in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax. Logic, history,[4] the expressed intent of Congress, and a straightforward reading of the regulations all join here to compel the opposite conclusion. Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917, it never was subject to the federal gift tax and therefore was never a "taxable transfer" for federal gift tax purposes. Once the pretense that by some mysterious alchemy the treasury regulations have transformed the 1917 transfer into a taxable event is stripped away, the government is left without any basis to sustain its position.

As taxpayers point out, if Treasury Regulation § 25.2511-1(c)(2) is inapplicable—and we hold that it is—then state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes. *See*

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[4] The Supreme Court struck down, on Due Process grounds, the original federal gift tax (enacted in 1924) to the extent it attempted to tax transfers completed prior to its effective date. *Blodgett v. Holden*, 275 U.S. 142 (1927).

Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir.) (where no applicable regulation Court applied state law to determine the validity for federal gift tax purposes of disclaimers of rights to intestate shares), *cert. denied*, 344 U.S. 836 (1952); *see also Jewett v. Commissioner*, 455 U.S. 305, 315 (1982) (under cases antedating the initial regulation on disclaimers in 1958, "state law controlled both the 'right' to renounce and the 'timeliness' of the renunciation"). The government concedes Mrs. Irvine's disclaimer is valid under Minnesota law. The regulation being inapplicable, this disclaimer therefore is not a transfer upon which a gift tax is owed.

Having concluded that Treasury Regulation § 25-2511-1(c)(2) is inapplicable, we have no occasion to consider the issues concerning the impact of that regulation on Mrs. Irvine's disclaimer. Those issues are discussed in the latter portion of the dissenting opinion. Because in our view they are not live issues in this case, we do not reach them.

IV.

We hold that the creation in 1917 of Mrs. Irvine's interest in the Ordway trust was not a taxable transfer. It follows that Treasury Regulation § 25.2511-1(c)(2) is inapplicable. Accordingly, Mrs. Irvine's refusal to accept part of this nontaxable gift from her grandfather—a refusal valid under state law—also is not a taxable transfer. As the federal gift tax does not apply to Mrs. Irvine's disclaimer, the decision of the District Court in favor of taxapayers is affirmed.

LOKEN, Circuit Judge, concurring.

I join the opinion of the court because I agree that the current 1986 version of Treas. Reg. § 25-2511-1 (c) (2) does not apply in this case. Lucius Ordway's creation of the trust in 1917 was not a taxable transfer. However, I am not as confident as the court that the government's contentions are limited to the current version of the regulation. Therefore, I write separately to address whether the regulation in effect when Mrs. Irvine made her disclaimer applies to this case.

The regulation as initially promulgated in 1958 did not contain the current regulation's reference to "taxable transfers." [1] It provided in relevant part:

> Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be . . . effective under the local law. . . . [I]f a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer,

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[1] The pivotal issue in this case is whether Mrs. Irvine's 1979 disclaimer was a taxable transfer. The 1917 transfer is relevant only because the current regulation makes it relevant. To illustrate this point by an obvious example, if my father gives property to my daughter tomorrow, whether that transfer is a taxable gift does not turn on whether he acquired the property by gift from his grandparents in 1917.

> he will be presumed to have accepted the property.

Treas. Reg. § 25.2511-1(c) (1958). With minor changes, this regulation was in effect in 1979 when Mrs. Irvine made her disclaimer. Under this regulation, Mrs. Irvine did not make her 1979 disclaimer "within a reasonable time after learning of the existence of the transfer." *See Jewett v. Commissioner*, 455 U.S. 305, 318-319 (1982). Consequently, I find it surprising that the government has referred to the 1958 regulation in its briefs but has not expressly argued that this regulation does apply, that under it Mrs. Irvine must be "presumed to have accepted the property" prior to her 1979 disclaimer, and therefore that she should be considered the owner of that property interest and her disclaimer a taxable gift.[2]

My answer to this argument is a simple one—this—prior version of the regulation does not apply in this case because it only applied to "property transferred from a decedent," whereas the interest Mrs. Irvine disclaimed was created by an inter vivos trust. At first blush, that may seem like an overly-technical reading of the regulation. I submit it is not.

As Congress recognized when it adopted I.R.C. § 2518 in 1976, two district federal tax issues arise from disclaimers. The first is the issue in this case: whether a disclaimer is a taxable event. The second issue concerns the effect a disclaimer will have on the original transfer of the disclaimed interest, for

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[2] As this court has recognized, the gift tax applies broadly to direct and indirect transfers of property interests including contingent remainders and other future interests. *See* Treas. Reg. §§ 25.2511-1(f), 25.2512-5; *O'Reilly v. Commissioner*, 973 F.2d 1403, 1405 (8th Cir. 1992).

instance, when the disclaimer passes property to a beneficiary that qualifies for the estate tax charitable or marital deduction. *See generally* H. R. Rep. No. 1380, 94th Cong., 2d Sess. 67, *reprinted in* 1976 U.S.C.C.A.N. 3356, 3421. Because this second issue is likely to be more significant in the case of testamentary transfers than inter vivos transfers, I cannot assume that the Commissioner inadvertently limited the 1958 regulation to testamentary transfers. In other words, this is not a case where plain limiting language in the regulation should be ignored.

When the Commissioner adopted Treas. Reg. § 25.2511-1(c) in 1958, Congress had recently enacted I.R.C. §§ 2055 and 2056, which provided that the estate tax charitable and marital deductions would apply to property that passed from the decedent to an eligible beneficiary who received the property by reason of a disclaimer made before the date prescribed for the filing of the estate tax return. I.R.C. of 1954, Pub. L. No. 591, §§ 2055(a), 2056(d), 68A Stat. 390-91, 395 (1954). In an October 1, 1958, Memorandum to the Secretary of the Treasury discussing the new regulation,[3] the Commissioner explained that the rule was intended to codify the adoption of state law in two testamentary cases, *Brown v. Routzahn*, 63 F.2d 914, 916 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), and *Hardenbergh v. Commissioner*, 198 F.2d 63, 66 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952). The regulation also added the limitation that, to avoid the federal gift tax, the disclaimer must be made within a reasonable time, a concept already reflected in sections 2055 and 2056 of the 1954 Code.

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[3] The Memorandum can be found at page 203-204 of the July 27, 1981 issue of Tax Notes.

There is further contemporaneous evidence that the Commissioner intentionally limited the 1958 regulation to the disclaimer of testamentary interests. In 1956, the American Law Institute published its Tentative Draft No. 11 of a proposed Federal Income, Estate and Gift Tax Statute. Section X1007(h) of that proposal provided that an "irrevocable renunciation of an interest in property" is not a taxable gift if made "within a reasonable time after the person . . . first bec[a]me aware of the existence of the interest." That provision expressly applied to disclaimers of interests obtained "through an inter vivos gift," as well as testamentary interests. Tentative Draft No. 11, § X1007(h)(2)(A)-(B) (A.L.I. 1956). When § 25.2511-1(c) was initially proposed, it too applied broadly to any "renunciation of a vested property interest." *See* 22 Fed. Reg. 53, 58 (Jan. 3, 1957). However, the final regulation applied only to a "refus[al] to accept ownership of property transferred from a decedent," with the explanation that "the Gift Tax Regulations have been conformed to agree with the positions taken in the Estate Tax Regulations." *See* the Commissioner's Memorandum cited in note 3. Though this history is less than fully enlightening, it persuades me that the Commissioner intentionally limited the 1958 regulation to the disclaimer of testamentary interests.[4]

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[4] Although the A.L.I. proposal included disclaimers of inter vivos as well as testamentary interests, the Comment to Tentative Draft No. 11, § 1007(h), at 32-33, acknowledged:

> Since an extension of the provision to inter vivos transfers raises greater possibilities of tax avoidance, however, it has been suggested that this section be limited to testamentary transfers. Such a limitation was rejected

Limiting the 1958 regulation to its plain language is also consistent with interests of fairness and predictability in the tax laws. This regulation was inconsistent with prior judicial interpretation of the statutes. *See Brown*, 63 F.2d at 916-17 (leaving the question of the timeliness of the renunciation entirely to local law without imposing a "reasonable time" requirement); Comment to Tentative Draft No. 11 § X1007(h), at 33. While the Commissioner's interpretation of the tax laws through regulations is entitled to substantial deference, we should not, many years after the fact, construe this regulation so as to extend it beyond its plain language in a manner that overrules otherwise governing case law upon which taxpayers have doubtless relied. Perhaps this is why the Commissioner has not directly relied upon the prior regulation on this appeal.

The Supreme Court "retroactively" applied the 1958 regulation to the 1972 disclaimer of interests created by a 1939 testamentary trust in *Jewett*, 455 U.S. at 316-18. However, the disclaimed interests in *Jewett* were plainly "property transferred from a decedent," and thus the taxpayer had fair warning fourteen years before his disclaimers that the regulation might apply. Here, on the other hand, the regu-

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in section X1007(h) because it was felt that the equities in favor of relieving from the gift tax a person who renounces a testamentary transfer applied equally to the renouncer of an inter vivos gift.

Since Congress had only addressed the question of testamentary disclaimers in the 1954 Code, this may explain why the Commissioner decided to leave the issue of inter vivos disclaimers to Congress or the courts. Congress ultimately resolved the issue in § 2518, though only prospectively.

lation was inapplicable on its face to Mrs. Irvine's contingent remainder interest in an inter vivos trust. With the regulation inapplicable, the fededal tax effects of Mrs. Irvine's 1979 disclaimer of that interest was governed by state law. Since the Commissioner concedes that her disclaimer was effective under Minnesota law, we must affirm.

McMILLIAN, Circuit Judge, with whom LAY and BRIGHT, Senior Circuit Judges, and JOHN R. GIBSON, Circuit Judge, join, dissenting.

I do not agree with the analysis of the majority opinion and accordingly dissent. I think the majority opinion's interpretation of "taxable transfer" as a transfer made after the enactment of the federal gift tax is too narrow.

"TAXABLE TRANSFER"

The majority opinion holds that Treasury Regulation § 25.2511-1(c)(2) is inapplicable because the trust which created Mrs. Irvine's contingent remainder interest pre-dated the enactment of the federal gift tax in 1932 and thus was not a "taxable transfer," that is, a transfer to which the federal gift tax is, or would have been, applicable. I would instead follow the analysis in *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990) (*Ordway*), *cert. denied*, 111 S. Ct. 2916 (1991). As noted by the majority opinion, the facts in *Ordway* and in the present case are virtually identical. In *Ordway* the Eleventh Circuit acknowledged that the original trust was not taxable, that is, in the sense it was not subject to federal gift tax, but concluded that it was a "taxable transfer" because, "[f]or the purposes of

measuring time, . . . a taxable transfer occurs whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax." *Id.*, *citing* 26 C.F.R. § 25.2511 (c)(1), .2815-2(c)(3). Thus, I would hold in the present case that the original trust can be considered a "taxable transfer" for purposes of determining whether Mrs. Irvine's partial disclaimer was made within a reasonable time for purposes of Treasury Regulation § 25.2511-1(c)(2).

In my view, the meaning of the term "taxable transfer" has less to do with liability for federal gift tax than with determining whether a completed gift has been made for federal gift tax purposes, regardless of whether a federal gift tax is actually imposed on that transaction. For this reason, I do not think the citation to the annual gift tax exclusion regulation, 26 C.F.R. § 25.2815-2(c)(3), is inapposite. What is critical in the present case is whether there was a completed gift, not the reason why no federal gift tax is incurrd with respect to that particular transfer. In other words, as long as the transfer effected a completed gift of property, then the transfer is a "taxable transfer," even though the transfer may not be subject to federal gift tax.

Interpreting "taxable transfer" to refer to whether the transfer effected a completed gift subject to federal gift tax, regardless of whether there was a federal gift tax at the time of the transfer, is supported by a close examination of the structure of the two Treasury regulations in question. Treasury Regulation § 25.2511-1, and § 25.2518 by cross-reference, defines transfers to which the federal gift tax applies and does not apply. For example, gifts of some kinds

of property by nonresidents who are not citizens of the United States are not subject to federal gift tax. *Id.* § 25.2511-1(b). If a husband and wife file a joint income tax return for a tax year, the payment by one spouse of all or part of the income tax liability for that year is not a transfer subject to federal gift tax. *Id.* § 25.2511-1(d). The regulations describe other types of transfers that are not subject to federal gift tax: transfer of bare legal title to a trustee, transfer for a full and adequate consideration in money or money's worth, or to ordinary business transactions. *Id.* § 25.2511-1(g)(1).

Of special interest in the present case, indirect transfers, effected by means of disclaimers or refusals to accept ownership of property, are transfers subject to federal gift tax: "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax." *Id.* § 25.2511-1(c); *Jewett v. Commissioner*, 455 U.S. 305, 310 (1982) (indirect transfer, by means of disclaimer, of contingent future interest in trust could be treated as taxable gift); *McDonald v. Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989). However, certain disclaimers are not transfers subject to federal gift tax. Section 25.2511-1(c) differentiates between disclaimers of interests created by "taxable transfers" before January 1, 1977, or after December 31, 1976, because the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, established specific uniform standards for determining whether a disclaimer constitutes a taxable gift and the effective date for the disclaimer provisions was December 31, 1976. *Id.* § 2009(e)(2).

Thus, in order to determine the validity of disclaimers for federal gift tax purposes, the relevant date is December 31, 1976. In my view, § 25.2511-1(c)(2) and § 25.2518 are complementary regulations: interests created by "taxable transfers" made after December 31, 1976, are subject to the "new" uniform standards established by the 1976 Act and § 25.2518, while interests created by "taxable transfers" before January 1, 1977, are subject to the "old" standards set forth in § 25.2511-1(c)(2). In the present case the 1976 standards and § 25.2518 do not apply because the contingent remainder interest which Mrs. Irvine disclaimed was created when the original trust was established in 1917, before January 1, 1977.

In my view, whether or not the interest created was established before the enactment of the federal gift tax is irrelevant; the key is whether the interest was created by a "taxable transfer," that is, a completed gift. The original trust effected a completed gift for federal gift tax purposes, even though it necessarily pre-dated the enactment of the federal gift tax, and thus was "taxable," even though it was not subject to federal gift tax. It was not a transfer to which the federal gift tax was not otherwise applicable, for example, a transfer for a full and adequate consideration in money or money's worth. Such a transfer would not have been a "taxable transfer" for federal gift tax purposes, regardless of whether it occurred before or after the enactment of the federal gift tax, because it was not a completed gift. Mrs. Irvine did not buy her contingent remainder interest; her grandfather gave it to her. For this reason, I would hold that the 1917 trust was a "taxable transfer" for purposes of determining the valid-

ity of the disclaimer of an interest created by it, even though it was not subject to federal gift tax.

The thrust of the majority opinion in disregarding the Eleventh Circuit's analysis in *Ordway* relates to, in my judgment, a misunderstanding of the *Ordway* opinion and the government's contention in the present case. The majority opinion's reasoning is that the government seeks to apply the gift tax retroactively to transfers made prior to June 6, 1932. In attempting to distinguish Treasury Regulation § 25.2511-1(c)(2) and Judge Frank Johnson's reasoned analysis in the *Ordway* case, the majority opinion relies upon *Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952). I respectfully submit such reliance is misplaced.

Treasury Regulation § 25.2518-2(c)(3) reads: "With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." The majority opinion urges that the Eleventh Circuit misapplies this regulation, because it is concerned "with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers." This completely distorts the meaning and purpose of the regulation. The Commissioner has simply declared that a donor can create a "taxable transfer," even if it is *not* subject to a tax, existing or not existing at the time of the transfer, if there happens "any transaction in which an interest in property is gratuitously passed or conferred upon another," 26 C.F.R. § 25.2511(c)(1).[1] Thus, even though the creation

[1] "The IRS's understanding of the terms of the Code is entitled to considerable deference." *United States v. National Bank of Commerce*, 472 U.S. 713, 730 (1985).

of the trust in 1917 was not taxable, it can still be viewed, in applying the Gift Tax Act to transfers of property interests after 1932, as a "taxable transfer."

The majority opinion suggests that the *Ordway* opinion of the Eleventh Circuit has taken Treasury Regulation § 25.2518-2(c)(3) out of context. This is not true. The reference to the $10,000 annual exclusion on gifts in § 25.2518-2(c)(3) is merely *an illustration* of how a taxable transfer may occur when there is a completed gift regardless of whether the gift tax is imposed on the completed gift. Treasury Regulation § 25.2518-2 is directed to § 2518(a) of the Internal Revenue Code which deals with the question of how a qualified disclaimer may take place. Subsection 3 of § 25.2518-2 relates to the new nine-month period for making a disclaimer which is now described in § 25.2518-2(c)(1). The flow of the entire language relates to inter vivos transfers and provides the Commissioner's declaration that as to inter vivos transfers a taxable transfer can take place regardless of whether a gift tax is imposed upon the completed gift.

In the present case the government has not attempted to impose a gift tax on the original transfer in trust made in 1917. The taxable transfer in the present case relates solely to Mrs. Irvine's indirect transfer resulting from the disclaimer in 1979. There is no attempt to tax the 1917 bequest and the tax upon the indirect transfer resulting from the disclaimer is not in any way dependent upon the original transfer in trust made by Mrs. Irvine's grandfather in 1917. *See Jewett v. Commissioner*, 455 U.S. 305.[2]

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[2] Congress has expressly stated that the gift tax shall not be given retroactive application. Revenue Act of 1932, ch.

The majority opinion attempts to analogize the creation of the Ordway trust in 1917 to the transfers pursuant to the 1931 antenuptial agreement at issue in *Commissioner v. Copley's Estate.* This is a complete *non sequitur.* The facts of *Commissioner v. Copley's Estate* are clearly distinguishable. In that case an antenuptial agreement was executed in 1931 between a man and a woman who were married later that year. The husband agreed to pay a sum of one million dollars to his wife payable upon demand at any time after they were married. In 1936 and in 1944, pursuant to the 1931 agreement, the husband transferred $500,000 in securities on each occasion. The Internal Revenue Service attempted to tax these transfers under the Gift Tax Act of 1932. However, the court held that this would require a retroactive application of the gift tax because the transfers made in 1936 and 1944 were simply discharging a contractual debt or obligation which the husband owed to his wife pursuant to the 1931 agreement. On this basis, the Seventh Circuit held that application of the 1932 gift tax act was impermissible because it would apply the gift tax act on a retroactive basis. Contrary to the majority opinion's reasoning, "the creation" of the Ordway trust in 1917 does not fall into the "same category." In *Commissioner v. Copley's Estate*, the transfers made in 1936 and 1944 were not subject to the gift tax because they constituted payments of an obligation under the 1931 agreement. In the present case, the disclaimer made by the taxpayer in 1979 is the transaction which *is* taxable. Be-

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209, § 501(b), 47 Stat. 169, 245 (1932). In support of its holding, the majority opinion seeks to inject the issue of retroactivity into this case where none actually exists.

cause Lucius Ordway made the original gift before January 1, 1977, 26 C.F.R. § 25.2511-1(c)2 applies. Under this regulation the disclaimer of interest made in 1979 is subject to the federal gift tax unless the disclaimer was valid under state law and was made within a reasonable time of the knowledge of the existence of the transfer.

As I now discuss, I would follow the original panel majority opinion as to the merits of the validity of the disclaimer.

DISCLAIMER WITHIN A REASONABLE TIME

As noted above, because the interest disclaimed by Mrs. Irvine was created by a taxable transfer before January 1, 1977, her disclaimer is subject to federal gift tax unless it was valid under state law and was "made within a reasonable time after knowledge of the existence of the transfer." 26 C.F.R. § 25.2511-1 (c)(2). It is undisputed that the disclaimer was valid under Minnesota law. What is disputed it whether the disclaimer was made within a reasonable time. This issue is a familiar one. *See Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (banc); *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973), *overruled by Jewett v. Commissioner*, 455 U.S. 305. I agree with the government's argument that Mrs. Irvine's disclaimer was not "made within a reasonable time after knowledge of the existence of the transfer." The "reasonable time" during which Mrs. Irvine could have made a disclaimer began to run in 1931, when she first learned of her interest, and not in 1979, when her interest vested upon the death of the last life beneficiary. Because Mrs. Irvine did not disclaim her contingent remainder inter-

est until 1979, some 48 years after she learned of its existence, her disclaimer was not effective.

In *Jewett v. Commissioner* the taxpayer's grandmother died in 1939, leaving the bulk of her estate in a testamentary trust. Under the terms of the trust, the trust income was payable to her husband for life and thereafter to the taxpayer's parents. Upon the death of the surviving parent, the trust was to be divided equally among her grandchildren then living or, if any grandchild had died, to that grandchild's child or children. In 1972, some 33 years after the creation of the trust and when the taxpayer's mother, who was one of the life beneficiaries, was still alive, the taxpayer disclaimed his interest in the trust. The taxpayer argued that the word "transfer" in the Treasury regulation referred to the vesting or distribution of property and that the "reasonable time" during which he could make a disclaimer did not begin to run until that interest vested upon the death of the last surviving life tenant. *See Keinath v. Commissioner*, 480 F.2d at 63-64 (holding that time within which disclaimer of vested remainder interest subject to divestiture must be filed begins to run when interest becomes indefeasibly fixed both in quality and quantity, that is, after death of life beneficiary, not testator). The Supreme Court rejected the taxpayer's interpretation and held that the relevant "transfer" referred to in the regulation occurred when the disclaimed interest was created and not later when that interest vested. 455 U.S. at 312, 318-19. The Court held that the taxpayer's disclaimer in 1972 was not made within a reasonable time of either the creation of the interest, some 33 years before, or when he reached the age of majority, some 24 years before. *Id.* at 318.

Thus, under *Jewett v. Commissioner*, the "reasonable time" during which Mrs. Irvine would have made a disclaimer began to run, at the latest, in 1931, when she became aware of her remainder interest and when she turned 21. Mrs. Irvine's partial disclaimer in 1979, some 48 years later, was clearly too late. This is twice as long as the period which the Supreme Court rejected in *Jewett v. Commissioner*. *Id.* (disclaimer 24 years after majority); *Ordway*, 908 F.2d at 895 (disclaimer made 38 years after knowledge of transfer and 36 years after age of majority). Moreover, the predecessor to the 1986 regulation was promulgated in 1958, well in advance of the 1979 disclaimer. The substantive requirement in the 1958 regulation that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer" was not changed in 1986. Certainly the adoption of the regulation in 1958 was sufficient to put Mrs. Irvine on notice that an "unreasonable" delay in refusing to accept ownership would not be effective for gift tax purposes. Even assuming the "reasonable time" period did not begin to run until 1958, Mrs. Irvine did not act until 1979, some 21 years later. *Cf. Jewett v. Commissioner*, 455 U.S. at 316 n.17 (citing *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.) (renunciation 8 years later was effective under state law but was considered unacceptable for federal tax purposes), *cert. denied*, 290 U.S. 641 (1933), 317 n.20 (taxpayer did not renounce interest until 14 years after adoption of 1958 regulation). In addition, it makes no difference for federal gift tax purposes that Mrs. Irvine's interest remained contingent until the death of her aunt, the last life beneficiary, in 1979. *Jewett v. Commissioner*,

455 U.S. at 317-18 (comparing disclaimer of contingent remainder to exercise of general power of appointment, which is a taxable transfer); *Ordway*, 908 F.2d at 893 n.4.

FAIRNESS

In 1979 *Keinath v. Commissioner*, which was decided in 1973 and in which the government did not seek certiorari, was the rule in this circuit. *Keinath v. Commissioner* held that the time within which the disclaimer must be filed begins to run when the remainder interest becomes "indefeasibly fixed in both quality and quantity" and that remainder interests subject to divestment did not become "indefeasibly fixed" until the death of the life beneficiary. 480 F.2d at 63. Thus, under *Keinath v. Commissioner* a disclaimer could be filed within a reasonable time of the death of the life beneficiary. *Id.* In the present case, the last life beneficiary died in June 1979 and Mrs. Irvine filed her partial disclaimer only two months later in August 1979, which was clearly "within a reasonable time" under the *Keinath v. Commissioner* rule. In 1980 this circuit affirmed *Keinath v. Commissioner* en banc in *Cottrell v. Commissioner*, 628 F.2d 1127. It was not until *Jewett v. Commissioner*, in 1982, two years later, that the Supreme Court changed the disclaimer rule and overruled *Keinath v. Commissioner*.

It does seem unfair to apply a rule announced in 1982 to a disclaimer which was valid under the applicable law when it was made in 1979. However, to the extent that the unfairness is due to the fact that at the time the new rule was announced, it was already too late to act, a similar retroactivity argu-

ment was rejected by the Supreme Court in *Jewett v. Commissioner*, 455 U.S. at 317 (rejecting taxpayer's argument that it was unfair to apply a 1958 regulation to an interest created in 1939). Moreover, to the extent that the unfairness is due to the fact that the disclaimer when it was made was valid under this circuit's case law, one must nevertheless acknowledge that that case law was subsequently overruled by the Supreme Court. This is the unavoidable, albeit in the present case expensive, consequence of our heirarchical court system. This court is an intermediate appellate court, and our decisions can be overruled by the Supreme Court.

In sum, I would hold that the original trust was a "taxable transfer" and that the disclaimer was not made within a reasonable time. Accordingly, I would reverse the order of the district court and would remand the case to the district court for further proceedings on the valuation issue.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5616

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the ESTATE OF SALLY O. IRVINE, APPELLEES

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the United States District Court
for the District of Minnesota

Submitted: September 10, 1991

Filed: June 10, 1991

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and BOWMAN, Circuit Judge.

McMILLIAN, Circuit Judge.

The United States (hereinafter the government) appeals from a final order entered in the District Court for the District of Minnesota granting sum-

mary judgment in favor of John O. Irvine and First Trust National Association (hereinafter taxpayers) as the personal representatives of the Estate of Sally Ordway Irvine (hereinafter Mrs. Irvine) and directing the government to refund federal gift taxes and interest paid by Mrs. Irvine for the third quarter of 1979 and the third quarter of 1980. For reversal, the government argues the district court erred in holding that Mrs. Irvine's partial disclaimer in 1979 of a remainder interest in a trust created by her grandfather in 1917 was not subject to federal gift tax. For the reasons discussed below, we agree with the government. Accordingly, we reverse the order of the district court and remand the case to the district court for further proceedings.

BACKGROUND FACTS

The underlying facts are not disputed. Mrs. Irvine was a granddaughter of Lucius P. Ordway. In January 1917 Lucius P. Ordway established an irrevocable inter vivos trust. The trust income was to be paid to Ordway's wife, Jessie G. Ordway, and their five children for their lives. The trust also provided that if any of Ordway's children died before the termination of the trust, that child's issue and his or her surviving spouse, as long as he or she remained unmarried, would receive the child's share of the trust income. On the death of the last surviving life beneficiary, the trust corpus was to be distributed to the grandchildren, per capita. If any of the grandchildren died with issue before the termination of the trust, that grandchild's share would be distributed to his or her surviving issue, per stirpes. Mrs. Irvine became aware of her interest in the trust when she turned 21 in 1931.

In June 1979 Katharine G. Ordway, who was Mrs. Irvine's aunt and the last surviving child of Lucius P. Ordway, died unmarried, and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at the time of Katharine G. Ordway's death. Because one grandchild had died with issue, the trust corpus was to be divided into thirteen shares. On August 17, 1979, about two months after Katharine G. Ordway's death but 48 years after Mrs. Irvine had become aware of her interest in the trust, Mrs. Irvine disclaimed part of her share in the trust corpus. It is undisputed that Mrs. Irvine's partial disclaimer was valid under Minnesota law. Minn. Stat. Ann. § 501.211 (West 1989) (valid disclaimer if filed in Minnesota district court within six months of event which causes disclaimant to be finally ascertained and interest indefeasibly fixed) (repealed by 1989 Minn. Laws, ch. 340, art. I, § 70 (codified at Minn. Stat. Ann. § 501B.86 (West 1990) (within nine months) (effective Jan. 1, 1990)). By virtue of the partial disclaimer, Mrs. Irvine's five children received, per stirpes, the disclaimed portion of her share of the trust corpus.

In November 1979 Mrs. Irvine filed a third quarter gift tax return reporting the disclaimer but stating that the partial disclaimer was not a transfer subject to the gift tax. Following an IRS audit of that return, Mrs. Irvine filed an amended gift tax return in March 1982, reported the partial disclaimer as a taxable transfer, and paid the gift tax due, $7,468,671.00. In April 1982 she paid an additional $2,086,627.51 in accrued interest on the deficiency. In the meantime, in August 1980, Mrs. Irvine had created a charitable remainder annuity trust and transferred $120,000.00 to the First Trust Co. of St.

Paul as trustee. This transfer was a taxable gift to the income interest under the annuity (determined to be $75,337.00 under the applicable Treasury regulations). In November 1980 Mrs. Irvine filed a 1980 third quarter gift tax return reporting the transfer to the trust company as a taxable gift. Because the tax due on the transfer, $15,427.62, was offset by Mrs. Irvine's remaining unified credit against estate and gift taxes, the 1980 third quarter gift tax return showed no gift tax due. In June 1982 the IRS notified Mrs. Irvine that because the adjustments made to her 1979 third quarter gift tax return on account of the partial disclaimer had reduced the amount of unified credit available to her by $38,000.00, she owed an additional $44,035.90 in gift taxes for the transfer to the annuity trust. In September 1982 Mrs. Irvine paid the additional taxes due and accrued interest ($10,959.51).

In 1984 Mrs. Irvine filed timely claims for refunds of the gift taxes and interest paid. In March 1987 the IRS disallowed the refund claims. Mrs. Irvine died on November 1, 1987.

PROCEEDINGS IN DISTRICT COURT

In February 1988 taxpayers, as the personal representatives of Mrs. Irvine's estate, filed the present action against the government in federal district court seeking a refund of the gift taxes and interest paid. 26 U.S.C. § 7422; 28 U.S.C. § 1346(a)(1). Taxpayers also alleged that the value of the disclaimed remainder interest had been overstated in the 1979 third quarter gift tax return. The parties filed cross-motions for summary judgment. The government argued that the 1979 partial disclaimer was

a transfer subject to federal gift tax because it had not been made "within a reasonable time after knowledge of the existence of the transfer" as required by Treasury Regulation § 25.2511-1(c). The government cited in support *Jewett v. Commissioner*, 455 U.S. 305 (1982) (*Jewett*). Taxpayers disagreed and argued that the gift tax did not apply because the Ordway trust pre-dated the enactment of the gift tax in 1932 and the gift tax applies prospectively only, 26 U.S.C. § 1000. Taxpayers argued that *Jewett* was distinguishable from the present case because the trust in *Jewett* had been established in 1939, well after the enactment of the gift tax. Taxpayers argued in the alternative that *Jewett* had been wrongly decided. Following a hearing on the cross-motions for summary judgment, the district court held that the 1979 partial disclaimer was not a taxable transfer and granted summary judgment in favor of taxpayers. The district court agreed with taxpayers' argument that the gift tax could not be applied retroactively to tax pre-1932 transfers. Slip op. at 8. The district court distinguished *Jewett* because that case involved a 1939 transfer and thus did not involve any question of retroactive application. *Id.*, *citing Ordway v. United States*, No. 87-81877-CIV-TES (S.D. Fla. Mar. 13, 1989), *rev'd*, 908 F.2d 890 (11th Cir. 1990) (*Ordway*), *petition for cert. filed*, 59 U.S.L.W. 3687 (U.S. Mar. 27, 1991) (No. 90-1503).[1] The district court further noted that Mrs. Irvine's remainder interest remained

[1] The district court did not of course have the benefit of the appellate opinion in *Ordway v. United States* at the time it decided the present case in September 1989. The Eleventh Circuit did not decide *Ordway v. United States* until August 1990.

contingent until the death of her aunt in 1979. Slip op. at 9-10. The district court directed the government to refund the gift taxes and interest paid for both the third quarter of 1979 and 1980 because the reduction in the unified credit at issue in the 1980 return had been premised upon the invalidity of the 1979 partial disclaimer. This appeal followed.

STANDARD OF REVIEW

We review de novo the district court's decision to grant summary judgment. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see, e.g., McCuen v. Polk County*, 893 F.2d 172, 173 (8th Cir. 1990). In the present case, the relevant facts are not disputed. The issue on appeal is a legal one—whether Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in a trust created in 1917 was a transfer subject to the federal gift tax.

APPLICABILITY OF GIFT TAX TO INTEREST CREATED BEFORE 1932

"Federal gift tax is imposed 'on the transfer of property by gift.'" *McDonald v. Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988) (*McDonald*) (citing 26 U.S.C. § 2501(a)(1)), *cert. denied*, 490 U.S. 1005 (1989). "The scope of this tax is broad, applying 'whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.'" *McDonald*, 853 F.2d at 1499, *citing* 26 U.S.C. § 2511(a). "A trust beneficiary's refusal to

accept ownership of property may constitute an indirect gift to a successor in interest subject to federal gift tax liability." *Jewett*, 455 U.S. at 306. "Under Treasury Regulation 26 C.F.R. § 25.2511-1 (c), however, such a refusal is not subject to tax if it is effective under local law and made 'within a reasonable time after knowledge of the existence of the transfer.'" *Id.* "The effect of these disclaimer provisions is to collapse the entire transaction into a single transfer from the original power to the ultimate recipient, thereby ignoring the gift tax consequences of the intermediate disclaimer." *McDonald*, 853 F.2d at 1499, *citing Kennedy v. Commissioner*, 804 F.2d 1332, 1334 (7th Cir. 1986).

The government argues that retroactive application of the gift tax is not the real issue because it seeks to impose the gift tax on the 1979 partial disclaimer, not the inter vivos transfer that created the trust in 1917, and that the present case cannot be meaningfully distinguished from *Jewett*. In *Ordway* the Eleventh Circuit agreed with the government's argument and held that the gift tax did apply to the disclaimer of an interest created before its enactment in 1932. 908 F.2d at 893-95. The facts in the present case and *Ordway* are identical, except that the disclaiming individual in *Ordway* was Mrs. Irvine's brother. We agree with the Eleventh Circuit's analysis and accordingly hold that gift tax does apply to the disclaimer of an interest created before 1932.

We agree with the Eleventh Circuit that the fact that the creation of the Ordway trust in 1917 predated the enactment of the federal gift tax in 1932 is not dispositive. *Ordway*, 908 F.2d at 893. Although Congress first passed a federal gift tax in 1924, the Supreme Court held it was unconstitutional

because it imposed a tax on transfers made before the date of the act. *See id.* (citations omitted). For this reason, the first valid gift tax statute, passed in 1932, expressly provided that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 169. In the present case, as in *Ordway*, the government does not seek to tax the transfers that created the Ordway trust in 1917; it seeks to tax Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in the trust, an indirect transfer which occurred well after both the enactment of the gift tax in 1932 and Treasury Regulation § 25.2511-1(c), which was originally promulgated in 1958.

TAXABLE TRANSFER

Retroactivity is also implicated in another aspect of the present case. As promulgated in 1958, Treasury Regulation § 25.2511-1(c) provided in part that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be must [*sic*] unequivocal and effective under the local law." Subsequently, in 1976, Congress enacted § 2518 of the Internal Revenue Code, providing that a "qualified" disclaimer of any interest in property would not be treated as a taxable transfer but "as if the interest had never been transferred to [the disclaimant at all]," and replacing the "reasonable time" requirement with the requirement that "qualified" disclaimers must be made within nine months of the later of either the transfer creating the disclaimed interest or the disclaimant's

twenty-first birthday. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b)(1), 90 Stat. 1893 (*codified at* 26 U.S.C. § 2518(b)). However, the "qualified" disclaimer provision and the specific time limits apply only to interests created after December 31, 1976, the effective date of the act. *See* Treasury Regulation § 25.2518-1(a). Treasury Regulation § 25.2511-1(c) was amended in 1986, and § 25.2511-1(c)(2) (emphasis added) now provides in part that

> [i]n the case of *taxable transfers* creating an interest in the person disclaiming made before January 1, 1977, . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law.

Taxpayers argue § 25.2511-1(c)(2) cannot apply to Mrs. Irvine's partial disclaimer because her remainder interest was not created by a "taxable transfer." Taxpayers argue that the creation of the Ordway trust could not have been a "taxable transfer" because, as noted above, there was no gift tax when the Ordway trust was created in 1917. We disagree because Treasury Regulation § 25.2518-2(c)(3) provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." Thus, a "taxable transfer" occurs whenever there is " 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax." *Ordway*, 908 F.2d at 895, *citing* 26 C.F.R.

§ 25.2511(c)(1). We agree with this interpretation and hold that the term "taxable transfer" in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax.

DISCLAIMER WITHIN A REASONABLE TIME

Because the interest disclaimed by Mrs. Irvine was created by a taxable transfer before January 1, 1977, the disclaimer is subject to gift tax unless it was valid under state law and was "made within a reasonable time after knowledge of the existence of the transfer." It is undisputed that the disclaimer was valid under Minnesota law. What is disputed is whether the disclaimer was made within a reasonable time. This issue is a familiar one. *See Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (banc) (*Cottrell*); *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (*Keinath*), *overruled by Jewett v. Commissioner*, 455 U.S. 305 (1982); *cf. McDonald*, 853 F.2d 1494 (joint tenancy). The government argues that the disclaimer was not "made within a reasonable time after knowledge of the existence of the transfer" because Mrs. Irvine did not disclaim her remainder interest until 1979, some 48 years after she learned of its existence. The government argues that, under *Jewett*, the "reasonable time" during which Mrs. Irvine could have made a disclaimer began to run in 1931, when Mrs. Irvine learned of her remainder interest, and not in 1979, when her interest vested upon the death of the last life beneficiary. We agree.

In *Jewett* the taxpayer's grandmother died in 1939, leaving the bulk of her substantial estate in a testamentary trust. Under the terms of the trust, the

trust income was payable to her husband for life and thereafter to the taxpayer's parents. Upon the death of the surviving parent, the trust was to be divided equally among her grandchildren then living or, if any grandchild had died, to that grandchild's child or children. In 1972, some 33 years after the creation of the trust and when the taxpayer's mother, who was one of the life beneficiaries, was still alive, the taxpayer disclaimed his interest in the trust. The taxpayer argued that the word "transfer" in the Treasury regulation referred to the vesting or distribution of the property and that the "reasonable time" during which he could make a disclaimer did not begin to run until that interest vested upon the death of the last surviving life tenant. *See Keinath*, 480 F.2d at 63-64 (holding that time within which disclaimer of vested remainder interest subject to divestiture must be filed begins to run when interest becomes indefeasibly fixed both in quality and quantity, that is, after death of life beneficiary, not testator). The Supreme Court rejected the taxpayer's interpretation and held that the relevant "transfer" referred to in the regulation occurred when the disclaimed interest was created and not later when that interest vested. 455 U.S. at 312, 318-19. The Court held that the taxpayer's disclaimer was not made within a reasonable time of either the creation of the interest, 33 years before, or when he reached the age of majority, 24 years before. *Id.* at 318.

Thus, under *Jewett*, the "reasonable time" during which Mrs. Irvine could have made a disclaimer began to run, at the latest, in 1931 when she became aware of her remainder interest and when she turned 21. Mrs. Irvine's partial disclaimer in 1979, some 48 years later, was clearly too late. This is twice as

long as the period which the Supreme Court rejected in *Jewett*. 455 U.S. at 318 (disclaimer made 24 years after age of majority); *see Ordway*, 908 F.2d at 895 (disclaimer made 38 years after knowledge of transfer and 36 years after age of majority).

The district court also based its decision in part on the fact that Mrs. Irvine's remainder interest remained contingent until the death of her aunt, the last life beneficiary, in 1979. However, *Jewett* rejected the argument that "the disclaimer of a contingent remainder is not a taxable event." 455 U.S. at 317-18 (comparing disclaimer of contingent remainder to exercise of general power of appointment, which is a taxable transfer); *see Ordway*, 908 F.2d at 893 n.4.

RETROACTIVE APPLICATION OF *JEWETT*

Having concluded that the disclaimer of an interest created before the gift tax was enacted is a taxable transfer and that the disclaimer was not made "within a reasonable time," we now face another retroactivity issue, that is, whether it is appropriate to apply the "reasonable time" rule in *Jewett*, which was decided in 1982, to a partial disclaimer made in 1979. In 1979 *Keinath*, which was decided in 1973 and in which the government did not seek certiorari, was the rule in the Eighth Circuit. *Keinath* held that the time within which the disclaimer must be filed begins to run when the remainder interest becomes "indefeasibly fixed in both quality and quantity" and that remainder interests subject to divestment did not become "indefeasibly fixed" until the death of the life beneficiary. 480 F.2d at 63. Thus, under *Keinath*, a disclaimer could be filed within a reasonable time

of the death of the life beneficiary. *Id.* In the present case, the last life beneficiary died in June 1979 and Mrs. Irvine filed the partial disclaimer only two months later in August 1979 which was clearly, "within a reasonable time" under the *Keinath* rule. In 1980 we affirmed *Keinath* en banc in *Cottrell*, 628 F.2d 1127. It was not until the decision in *Jewett*, some two years later, that the disclaimer rule was changed and *Keinath* was overruled.

As in *Ordway*, 908 F.2d at 896, neither the government nor taxpayers addressed this retroactivity issue on appeal in the present case. In *Ordway* the court decided that because non-retroactivity was an affirmative defense, the taxpayers' failure to raise that defense constituted a waiver and applied *Jewett* retroactively. *Id. But see id.* at 896-97 (Gibson, J., dissenting) (unfair to apply *Jewett* retroactively to 1979 disclaimer when to do so means taxpayer "will suffer severe tax consequences for failing to do something at a time when the law provided him with no notice that he needed to act"). We also decline to reach this issue.[2]

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[2] It does seem unfair to apply a rule announced in 1982 to a disclaimer which was valid under the applicable law when it was made in 1979. However, to the extent that the unfairness is due to the fact that at the time the new rule was announced, it was already too late to act, we note that a similar retroactivity argument was rejected by the Supreme Court in *Jewett v. Commissioner*, 455 U.S. 305, 317 (1982) (*Jewett*). In *Jewett* the taxpayer argued that it was unfair to apply a 1958 regulation "retroactively" to an interest that had been created in 1939. The taxpayer argued that at the time the regulation was promulgated, it was already too late, at least according to the government, to disclaim the interest. The Court held there was no retroactivity problem because the taxpayer's argument was "based on an assumption that

Accordingly, the order of the district court is reversed and the case is remanded to the district court for further proceedings on the valuation issue.

BRIGHT, Senior Circuit Judge, concurring in the result.

I agree that Mrs. Irvine's disclaimer was not valid for federal gift tax purposes. Very simply put, the 1917 gift from Lucius P. Ordway in trust to his wife and heirs constituted a taxable transfer as that term is defined under the applicable gift tax laws and regulations. *See* Treas. Reg. § 25.2518-2(c)(3) (1990). "With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift."

[he] had a 'right' to renounced the interest without tax consequences that was 'taken away' by the 1958 Regulation," but the taxpayer "never had such a right." *Id.* The Court further noted that the regulation had been adopted "well in advance" of the disclaimers.

In the present case, the partial disclaimer was valid under the applicable law in effect at that time; however, the Supreme Court subsequently held in *Jewett* that the applicable law, that is, this court's decision in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (*Keinath*), was incorrect. This is the unfortunate but unavoidable, and in the present case, admittedly costly, consequence of our hierarchical court system. This court is an intermediate appellate court and our decisions are subject to review and to being overruled by the Supreme Court. *Compare Poinier v. Commissioner*, 858 F.2d 917, 918-19 (3d Cir. 1988) (sister's disclaimer held untimely under *Jewett*), *cert. denied*, 490 U.S. 1019 (1989), *with Cottrell v. Commissioner*, 628 F.2d 1127, 1129 (8th Cir. 1980) (banc) (sister's disclaimer held timely under *Keinath*; same family involved in *Poinier v. Commissioner*).

Id. Thus, "taxable transfer", as used in the regulation, merely describes a class of interests to which the regulation applies based upon the nature of the transactions creating them. It is not meant to literally refer solely to transfers in which gift taxes were assessed. Therefore, under Treas. Reg. § 25.2511-1(c)(2) (1990),[1] Mrs. Irvine's remainder interest was subject to the federal gift tax unless her disclaimer, as to the portion here in question, was timely.

Pursuant to *Jewett v. Commissioner*, 455 U.S. 305 (1982), the time period for Mrs. Irvine to disclaim her interest began to run, at the latest, in 1931 when she was aware of her remainder interest and had reached the age of majority. Clearly, Mrs. Irvine's

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[1] Treas. Reg. § 25.2511-1(c)(2) (1990) reads in pertinent part:

> In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transfered from a decedent . . ., a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. . . . There can be no refusal of ownership of property after its acceptance. In the absence of the facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.

Although this regulation read differently at the time Mrs. Irvine made her disclaimer, absent a contrary indication from the Secretary of the Treasury, tax regulations apply retroactively to the year of the Tax Code they interpret, in this case—1976. *See* 26 U.S.C.A. § 7805(b) (West Supp. 1991).

partial disclaimer, almost fifty years later, was not made within a reasonable time. *See Jewett*, 455 U.S. at 318 (rejecting disclaimer made twenty-four years after reaching age of majority for federal gift tax purposes). Such a late disclaimer will not operate to avoid the application of the federal gift tax laws.

BOWMAN, Circuit Judge, dissenting.

I respectfully dissent. The question on which this case turns is whether Sally Irvine's 1979 partial disclaimer of her contingent remainder interest in an irrevocable trust created in 1917 (when there was no federal gift tax) is a transfer subject to the federal gift tax. The opinion of the Court holds that it is, based on the application of Treasury Regulation § 25.2511-1(c)(2), which provides:

> [i]n the case of *taxable transfers* creating an interest in the person disclaiming made before January 1, 1977 . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance.

Treas. Reg. § 25.2511-1(c)(2) (as amended in 1986) (emphasis added). This regulation reflects the unassailable premise that a disclaimer is not subject to the federal gift tax unless the transfer creating the interest disclaimed was a "taxable transfer" for purposes of the Gift Tax Act. I note without surprise that the Treasury Department has not promulgated any regulation dealing with the refusal to accept

ownership of interests created by "nontaxable transfers."

The transfer that created Mrs. Irvine's contingent remainder interest is the irrevocable inter vivos trust created by Lucius P. Ordway in 1917. If the establishment of this trust is indeed a "taxable transfer," even though in 1917 the federal gift tax had not yet been enacted, then Mrs. Irvine's disclaimer of her contingent remainder interest created by the trust would be subject to the federal gift tax unless her disclaimer was timely.[1] But if the creation of her interest by the 1917 Ordway trust is not a "taxable transfer," then the interest validly disclaimed by Mrs. Irvine under Minnesota law passes to her five children unencumbered by the federal gift tax.

It seems fundamental to me that for a transfer to be taxable there must be an applicable tax in existence when the transfer is made. No such federal tax existed on January 16, 1917 when Lucius P. Ordway irrevocably transferred assets to the trustees of the Ordway trust and Mrs. Irvine's interest was created. Moreover, fifteen years later when the Gift Tax Act of 1932 was enacted, Congress expressed its intention not to apply the tax retroactively. Section 501(b) of the Act states: "The tax shall not apply to a transfer made on or before the date of enactment of this Act [June 6, 1932]." Revenue Act of 1932 § 501(b), 47 Stat. 169, 245. This prohibi-

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[1] The issue of timeliness is the subject of *Jewett v. Commissioner*, 455 U.S. 305 (1982). *Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here. It was beyond dispute in *Jewett* that the transfer creating an interest in the person disclaiming was a taxable transfer.

tion against retroactive application of the tax to pre-Act gifts has been continued throughout revisions of the Gift Tax Act and is reflected in the current Code in the section governing computation of the tax. 26 U.S.C. § 2502 (1988) (the tax is computed upon the aggregate sum of taxable gifts made throughout the donor's life during periods following June 6, 1932). "Congress has been careful to avoid any taint of retroactivity in connection with the 1932 [gift] tax and the subsequent amendments to the tax." C. Lowdnes, R. Kramer, J. McCord, *Federal Estate and Gift Taxes* 643 (3d ed. 1974).

However, where Congress has feared to tread the Eleventh Circuit has rushed in with its stunning determination that "the 1917 gift [of Lucius P. Ordway] was a taxable transfer." *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990), *petition for cert. filed*, No. 90-1503 (Mar. 27, 1991). The *Ordway* decision gives a new definition to the term "taxable transfer" by referring to section 25.2518-2(c)(3) of the regulations, which provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." Treas. Reg. § 25.2518-2(c)(3). Based on that language, the *Ordway* decision concludes that "a taxable transfer occurs whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' 26 C.F.R. § 25.2511(c)(1) [sic], even if that transaction was not subject to the gift tax." 908 F.2d at 895.

The opinion of the Court in the case before us agrees with the *Ordway* court's interpretation of Treasury Regulation § 25.2518-2(c)(3) and holds,

ante at 7, that "the term 'taxable transfer' in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax." I cannot accept that startling conclusion. The Court's reliance on a single sentence from a regulation explicating a section of the Code that is clearly inapplicable to the facts here[2] is inappropriate and misplaced. Moreover, the sentence is taken out of context to support an expanded and illogical definition of the term "taxable transfer" to include a pre-Act transfer. This distorted interpretation is evident when the sentence is read in context with the sentence that immediately follows it: "[A] taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers. . . ." Treas. Reg. 25.2518-2(c)(3). Clearly, the sentence upon which the Eleventh Circuit and now our Court mistakenly rely is concerned with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers. There is a definitive difference between a taxable transfer that qualifies for the annual exclusion and on which a gift tax therefore is not imposed, such as an annual $10,000 check to a favorite nephew, and a transfer as to which the gift tax is not even applicable, such

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[2] Mrs. Irvine's disclaimer clearly is not governed by section 2518 of the Code. The interest she disclaims was created by a transfer in the year 1917. Section 2518 applies only to the disclaimer of interests created by taxable transfers made after December 31, 1976. Treas. Reg. § 25.2518-1(a)(1).

as a transfer pursuant to an obligation created in an antenuptial agreement executed in 1931 between a man and woman married later that year. *See Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952) (holding that transfers made in 1936 and 1944 pursuant to the 1931 agreement were not taxable because "[t]o hold, as the Commissioner would have us do . . . would require a retroactive application of [the gift tax], which we think is not permissible. See Sec. 501(b) of the Revenue Act of 1932."). The creation of the Ordway trust in 1917 falls into the same category as the transfers pursuant to the 1931 antenuptial agreement in *Copley's Estate*; it is a transfer as to which the federal gift tax is inapplicable—and even more cleanly and clearly so than the post-1932 transfer pursuant to the 1931 agreement in *Copley's Estate*.

In light of the consistently expressed intent of Congress not to apply the gift tax retroactively to transfers made prior to June 6, 1932, I cannot join in the Court's holding that "the term 'taxable transfer' in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax." *Ante* at 7. Logic, history,[3] the expressed intent of Congress, and a straightforward reading of the regulations all join here to compel the opposite conclusion. Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917, it never was subject to the federal gift tax and therefore was never a "taxable transfer" for federal gift tax purposes. Once the pretense that by

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[3] The Supreme Court struck down, on Due Process grounds, the original federal gift tax (enacted in 1924) to the extent it attempted to tax transfers made prior to its effective date. *See Blodgett v. Holden*, 275 U.S. 142 (1927).

some mysterious alchemy the treasury regulations have transformed the non-taxable 1917 transfer into a taxable event is stripped away, the government is left without any authority (other than *Ordway*, which cannot withstand critical analysis) to support its position.

As the federal gift tax simply does not apply here, I forego discussion of the issues concerning the timeliness of the disclaimer and the retroactive application of *Jewett*. If the gift tax is inapplicable, as I believe it plainly is, then these are non-issues.

For the reasons stated, I would affirm the decision of the District Court in favor of the taxpayers.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. File No. 3-88-061

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the ESTATE OF SALLY O. IRVINE, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Sep. 18, 1989]

Phillip H. Martin, Esq., Faith L. Ohman, Esq., Mary J. Streitz, Esq., Dorsey & Whitney, 2100 First Bank Place East, Minneapolis, MN 55402; Cole Oehler, Esq., Richard H. Kyle, Esq., Briggs & Morgan, 2200 First National Bank Building, St. Paul, MN 55101, for the plaintiffs.

Thomas D. Sykes, Esq., Trial Attorney, Tax Division, U.S. Department of Justice, P.O. Box 683, Ben Franklin Station, Washington, D.C. 20044; Jerome G. Arnold, Esq., U.S. Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, for the defendant.

MEMORANDUM AND ORDER

This matter is before the court upon cross motions for summary judgment. For the reasons set forth below, the court grants plaintiffs' motion and denies defendant's motion.

FACTUAL BACKGROUND

The facts underlying this action are essentially undisputed. This is a tax refund action against the United States seeking refund of $9,628,293.92 in gift tax and interest assessed against Sally Ordway Irvine. Plaintiffs John O. Irvine and First Trust National Association have brought this action as co-representatives of Sally Irvine's estate and as sucessors-in-interest to her refund claims. The central issue in this motion is whether a written disclaimer executed by Sally Irvine on August 21, 1979, is legally effective. If the disclaimer is valid under the internal revenue code, then plaintiffs are entitled to the refund they seek.

Lucius Ordway, Sally Irvine's grandfather, created the trust at issue in this litigation on January 16, 1917, in Ramsey County, Minnesota. The trust instrument provided that the trust was to continue until the death of the survivor of Lucius Ordway's wife and five living children, John G. Ordway (Sally Irvine's father), Samuel G. Ordway, Lucius P. Ordway, Jr., Katherine Ordway, and Richard Ordway. From the income of the trust Lucius Ordway's wife received an annuity of $14,000, and the Ordway children (or after the child's death, the surviving spouse and issue) received any additional income in five equal shares. The trust instrument provided for

termination of the trust and distribution of the trust corpus as follows:

> Upon the death of the survivor of my wife and children, and the termination of the aforesaid trust, said trustees shall pay over and transfer the trust fund in equal shares to each of my grandchildren per capita and not per sturpes [sic]. If any of my grandchildren shall then have died leaving issue, said children shall be entitled to equal portions of the share of said deceased grandchild.

Sally Irvine was born on December 23, 1910, and was six years old when the trust was created. She reached majority on December 23, 1931. Katharine Ordway, the survivor of Lucius Ordway's wife and children, died on June 27, 1979. On that date, twelve grandchildren of the settlor were alive (including Sally Irvine), one grandchild had died leaving issue, and another grandchild had died without issue. Accordingly, each of the twelve living grandchildren and the issue of the deceased grandchild were entitled to receive a 1/13 share of the trust corpus.

Until the termination of the trust, Sally Irvine possessed a contingent remainder interest in the trust corpus. Her entitlement to a share of the trust principal was contingent on her survival beyond the date on which the survivor of Lucius Ordway's wife and children died. This contingency was satisfied upon the death of Katharine Ordway. On August 21, 1979, slightly over two months after Sally Irvine's interest became indefeasibly fixed in quantity and quality, Mrs. Irvine disclaimed 5/16 of her 1/13 interest in the trust corpus, and she filed a written disclaimer with the Ramsey County District Court. The Ramsey

County court concluded, in an order dated September 6, 1979, that the disclaimer was valid under Minnesota law.

On audit, the Internal Revenue Service (IRS) determined that the disclaimer was not valid under the internal revenue code and that the disclaimer effected a taxable gift. The IRS assessed a gift tax and interest for the calendar quarters ending September 1979 and September 1980. Sally Irvine paid the tax and interest under protest and then filed with the IRS for a refund.

The IRS assessed additional taxes as a result of its finding that the Irvine disclaimer was a taxable gift. The IRS reduced Irvine's available unified credit and assessed taxes on gifts to which the credit had been applied. Irvine paid the additional tax and interest and filed for a refund on the grounds that the disclaimer at issue was valid and effective. The IRS disallowed both of Irvine's refund claims on March 26, 1987, and plaintiffs responded by bringing this action.

ANALYSIS

In deciding cross-motions for summary judgment the court must apply the standards set forth in Fed. R.Civ.P. 56(c). Judgment shall be rendered for a moving party provided that the pleadings and materials on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson v. Libberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The judge's function at the summary judgment stage is not to weigh the evidence, but to de-

termine whether there is a genuine issue for trial. *Id.* at 249.

The IRS assessed taxes in this case under the authority of §§ 2501 and 2511 of the internal revenue code. In part, they provide:

> A tax, computed as provided in section 2502, is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by an individual, resident or nonresident.

26 U.S.C. § 2501(a)(1):

> subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible . . . .

26 U.S.C. § 2511(a). The Supreme Court has held that the board language of these provisions "purports to reach any gratuitous transfer of any interest in property." *Dickman v. Commissioner*, 465 U.S. 330, 333 (1984).

On the other hand, courts have long recognized an exception to federal estate and gift taxes for disclaimers. In *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied* 290 U.S. 641 (1933), a husband refused to accept a bequest under his wife's will. He filed an application for distribution with the probate court renouncing his interest in the property. Under Ohio law this was a valid disclaimer. The Collector of Internal Revenue assessed taxes on the property disclaimed, construing the disclaimer as a taxable transfer. The Sixth Circuit rejected the govern-

ment's position, holding that since the husband had never acquired ownership of the property, the disclaimer was not a taxable transfer. Instead, it was deemed an exercise of his right to refuse a gift of property. *Id.* at 916-17; *cited with approval in Jewett v. Commissioner*, 455 U.S. 305, 314-15 (1982).

In the case at hand the IRS does not contest the right of Sally Irvine to disclaim an interest in the trust corpus. However, the IRS contends that the disclaimer in this case is ineffective. The government relies on Treasury Regulation § 25.2511-1(c), which states:

> a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under local law.

26 C.F.R. § 25.2511-1(c).

In *Jewett* the Supreme Court invalidated a disclaimer on the grounds that it failed to comply with the "reasonable time" requirement of § 25.2511-1(c). The petitioner, George Jewett, had executed disclaimers of a contingent interest in a testamentary trust 33 years after the trust was created, but while his interest was still contingent. The trust had been created in 1939 at the death of the grantor, and the disclaimers were executed in 1972.

The facts of *Jewett* distinguish it from the case at hand, but the question addressed by the Supreme Court in *Jewett* is dispositive on the validity of the Irvine disclaimer. The *Jewett* Court identified the issue as follows: "The narrow question presented is whether the 'transfer' referred to in [§ 5.2511-1(c)] occurs when the interest is created, as the Govern-

ment contends, or at a later time when the interest either vests or becomes possessory, as argued by petitioner." *Id.* at 306. The Court concluded that the date of the transfer, for purposes of the gift tax, was the time of the grantor's death. The Court further ruled that applying § 25.2511-1(c), which was promulgated in 1958, retroactively to the 1939 transfer was not unfair. The Court noted that *Jewett's* argument against retroactivity

> is based on the assumption that petitioner had a 'right' to renounce the interest without tax consequences that was taken away by the 1958 Regulation. Petitioner never had such a right. Indeed, petitioner does not argue that taxation of the disclaimers is inconsistent with the statutory provisions imposing a gift tax, *which were enacted long before petitioner's interest in the trust was created.*

Id. at 317 (emphasis added).

The fundamental distinction between *Jewett* and the present case is that the original transfer by Lucius Ordway occurred in 1917, well before the Gift Tax Act was passed in 1932. The IRS would have the court extend *Jewett* and hold that § 25.2511-1(c) applies not only to pre-1958 transfers, but to transfers occurring before passage of the Gift Tax Act as well. Plaintiffs contend that such a construction of the Gift Tax Act and the regulations is unreasonable and was not intended by Congress. In the alternative, plaintiffs argue that application of § 25.2511-1(c) to pre-Act transfers is unconstitutional.

As originally enacted, the 1932 Gift Tax Act clearly states that "[t]he tax shall not apply to a transfer made on or before the date of enactment

of this Act." Gift Tax Act § 501(b) (1932), codified in 26 U.S.C. § 1000 (1932); *see also Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952) ("[T]he gift tax act of 1932 is not applicable to an obligation created prior to its enactment.") Subsequent revisions of the gift tax provisions have maintained the prohibition against taxation of pre-1932 transfers. *See* 26 U.S.C. § 2502 (calculation of gift tax begins with periods after June 6, 1932). Commentators have noted that "Congress has been careful to avoid any taint of retroactivity in connection with the 1932 [gift] tax and the subsequent amendments to the tax." C. Lowndes, R. Kramer & J. McCord, *Federal Estate and Gift Taxes* 643 (1974).

In light of the intent of Congress to avoid retroactive application of gift tax provisions, it would be inconsistent to subject the Irvine disclaimer to the requirements of § 25.2511-1(c). The *Jewett* court had no difficulty with retroactive application of the Regulation to a 1939 transfer, but the court premised its decision on the fact that the interest in question was created long after the Gift Tax Act had become law. *Jewett* does not suggest that disclaimers of pre-Act transfers must comply with § 25.2511-1(c). Moreover, applying the Regulation in this case would frustrate the expectations of the transferor (Lucius Ordway) and the transferee (Sally Irvine). Ordway created the trust at a time when such a gratuitous transfer had no tax consequences. Neither he, nor Sally Irvine, would have contemplated the need for a disclaimer at the time. Only after Congress passed the Gift Tax Act in 1932 did Irvine have a reason to disclaim an interest in the trust proceeds. Under the IRS's interpretation of the § 25.2511-1(c), it was too late for Irvine to execute an effective disclaimer

at this time because the disclaimer would not have been made within a reasonable time after the 1917 transfer. In the absence of statutory authority, legislative history or dispositive precedent the court will not employ such a harsh construction of § 25.2511-1(c).

In *Ordway v. United States*, 3 Fed. Est. & Gift Tax Rep. (CCH) Para. 13,802 (S.D. Fla. 1989), the court reached the same conclusion on virtually identical facts. The plaintiff, John G. Ordway, Jr., is the grandson of Lucius P. Ordway and a cousin to Sally Irvine. He also partially disclaimed an interest in the corpus of the Ordway trust in August of 1979. As with Irvine, the IRS assessed taxes on the disclaimer, finding that the disclaimer failed to comply with § 25.2511-1(c). The court granted summary judgment in favor of the plaintiff in Ordway's refund suit. Significantly, the court found that since the interest disclaimed was created prior to the enactment of the 1932 Act, § 25.2511-1(c) was inapplicable to the transfer.

This case is indistinguishable from *Ordway*, and the court finds the reasoning of *Ordway* compelling. Sally Irvine never accepted the interest that she disclaimed, and her disclaimer is valid under Minnesota law. The IRS contends that Irvine enjoyed "estate planning benefits" because she was aware of her status as a trust beneficiary from 1917 until 1979. This argument is without merit because Irvine's interest in the trust corpus remained contingent until the death of Katharine Ordway, which occurred in 1979.

Since Irvine's disclaimer was effective under Minnesota law, plaintiffs are entitled to the refund they seek in Count I of the complaint. Count II of the

complaint is entirely contingent on the effectiveness of the disclaimer as well. The IRS reduced Irvine's unified gift tax credit solely because it determined that the disclaimer was a taxable transfer. Consequently, the IRS assessed additional taxes. Having found for the plaintiffs on Count I, it follows that summary judgment is appropriate on Count II as well.

Accordingly, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment shall be, and hereby is, GRANTED.
2. Defendant's motion for summary judgment shall be, and hereby is, DENIED.
3. Within twenty days from the date of this order, plaintiffs shall submit a statement of the amount of refund that they seek, including accrued interest, claims for fees and costs. The defendant shall have ten days within which to respond.

Dated: September 18, 1989.

/s/ Paul A. Magnuson
PAUL A. MAGNUSON
United States District Court Judge

APPENDIX D

STATUTES AND REGULATION INVOLVED

1. 26 U.S.C. 2501(a)(1) provides, in relevant part:

> [A] tax, computed as provided in Section 2502, is hereby imposed on the transfer of property by gift * * * by any individual, resident or non-resident.

2. 26 U.S.C. 2511(a) provides, in relevant part:

> Subject to the limitations contained in this chapter, the tax imposed by Section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *.

3. Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. § 25.2511-1(c) (1958), provides, in relevant part:

> The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reason-

able time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of owner-ship of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.

4. Section 25.2511-1(c) of the Amended Gift Tax Regulations, 26 C.F.R. § 25.2511-1(c) (1986), provides in relevant part:

(1) The gift tax also applies to gifts indirectly made. Thus, any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax. See further § 25.2512-8 relating to transfers for insufficient consideration. However, in the case of a taxable transfer creating an interest in the person disclaiming made after December 31,

1976, this paragraph (c)(1) shall not apply to the donee if, as a result of a qualified disclaimer by the donee, the property passes to a different donee. Nor shall it apply to a donor if, as a result of a qualified disclaimer by the donee, a completed transfer of an interest in property is not effected. See Section 2518 and the corresponding regulations for rules relating to a qualified disclaimer.

(2) In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In

any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a completed and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. * * *

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